IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-160

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. AND LUEA SORENSON,

Petitioners,

No. 78-161

STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA

Petitioners,

THE STATE OF INDIANA AND OTHERS; THE STATE OF CALIFORNIA AND OTHERS; TITLE INSURANCE AND TRUST COMPANY; PIONEER NATIONAL TITLE INSURANCE COMPANY; AND AMERICAN LAND TITLE ASSOCIATION, AMICI CURIAE

v.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,

Respondents.

BRIEF FOR RESPONDENT OMAHA INDIAN TRIBE

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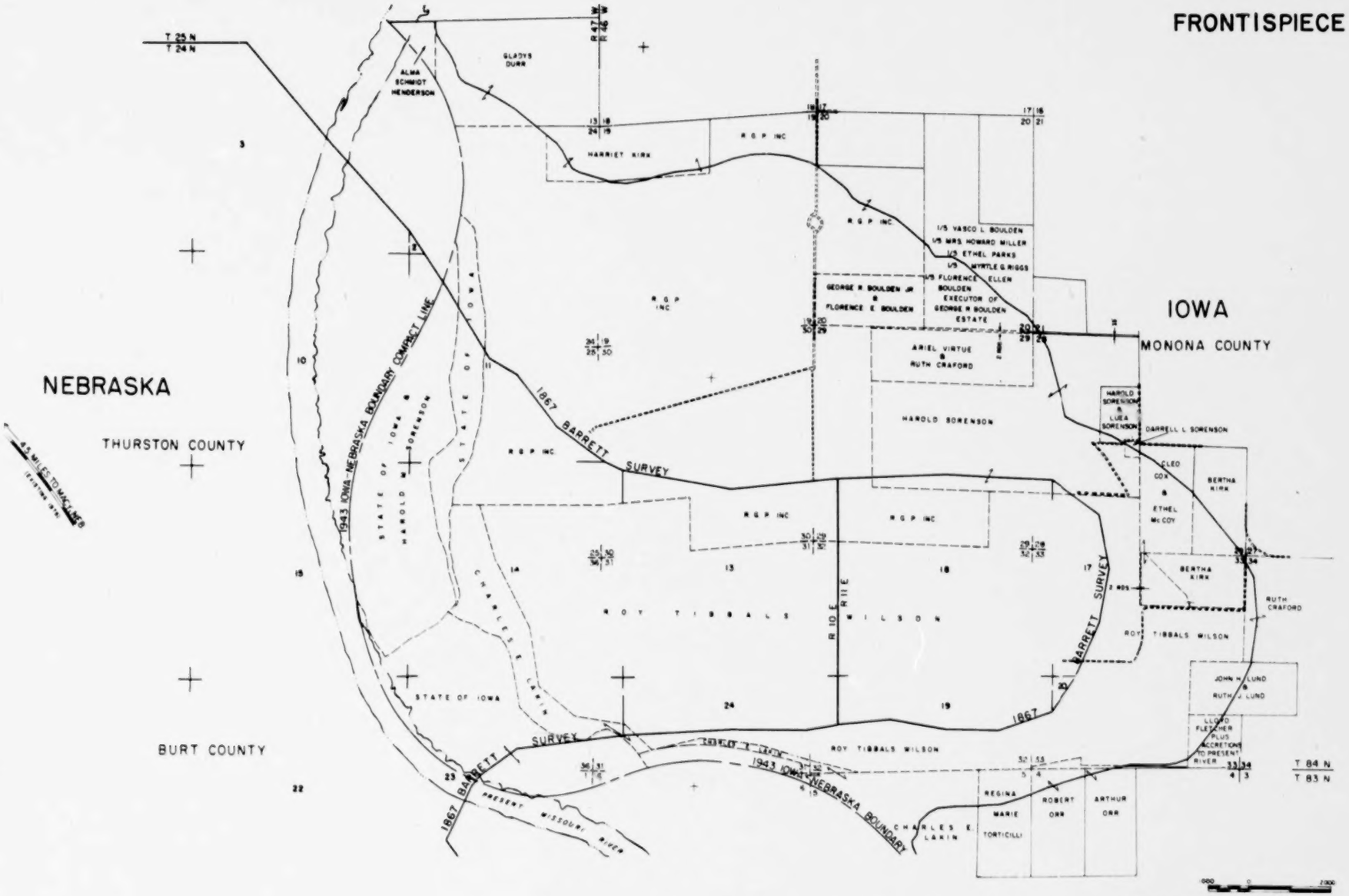
NOTE: Please note that, whenever "Petitioners" is used throughout the context of this Brief, it means all of Petitioners, unless otherwise stated.
Also, please note that, whenever "State of Iowa" is used, it means the State of Iowa and the State of Iowa Conservation Commission.

FRONTISPIECE



PORTION OF TRIBE'S EXHIBIT "78"

EXHIBIT

TRACT 1 BLACKBIRD BEND AREA
LAND OWNERSHIPS
COMPILED FROM
DEFENDANTS' ANSWERS
CASE C75-4067

E M CLARK & ASSOCIATES
DENVER, COLORADO

IN THE

Supreme Court of the United States

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OPINIONS BELOW *

The Opinion of the Court of Appeals, *Omaha Indian Tribe* v. *Wilson, et al.*, is reported in 575 F.2d 620 (CA 8, 1978); rehearing and rehearing on *En Banc* denied. The trial court's Findings of Fact, Conclusions of Law and its Memorandum Opinion are reported in 433 F.Supp. 57, *et seq.* (U.S.D.C. N.D. W.D. 1976). The trial court's Preliminary Injunction, maintaining the Omaha Indian Tribe and the United States in possession is at Appendix, pp. 119, *et seq.*; trial court's Partial Summary Judgment in favor of the Tribe, Appendix, pp. 184, *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. Petitions for Rehearing were denied on May 28, 1978. The Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

25 U.S.C., § 22 of the Indian Non-Intercourse Act of 1834, is as follows:

> "§ 194. Trial of right of property; burden or proof
>
> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

* Throughout, reference is made to Petitioners' Appendix for a Writ of Certiorari, which contains the Opinion of the Court of Appeals and the Findings of Fact, Conclusions of Law and Memorandum Opinion of the trial court, to which reference is made above. Those decisions are cited here as: App., A- or B- or C-. References to docket entries, pleadings and the record are made to: Appendix, with page numbers.

RULES OF THE SUPREME COURT

> "Rule 40. Briefs—in general.
>
> * * * *
>
> "1(d)(1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.
>
> "(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded save as the court, at its option, may notice a plain error not presented."

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the trial court and declaring the findings of fact adopted by the trial court were "clearly erroneous" due to the failure of Petitioners, including the State of Iowa, in seeking to sustain their burdens of proof, supporting the affirmative defenses that they asserted, had offered extensive expert opinions, which were unsubstantiated, conjectural, speculative and without any factual foundation?

2. Whether the Court of Appeals erred in declaring that there must be adherence to Federal law where, as here, the question is "whether" title to 2900 acres of land passed out of the Omaha Indian Tribe, as asserted by Petitioners, including the State of Iowa, in their affirmative defenses, in which they alleged and sought to

prove that, although title to the 2900 acres originally resided with the Omaha Indian Tribe, those 2900 acres were totally "obliterated" by the Missouri River action and restored "under the sky" by accretions to the Iowa riparian lands?

3. Whether the Court of Appeals erred in applying 25 U.S.C. 194, which placed the burden upon Petitioners, including the State of Iowa, to prove that the 2900 acres, title to which is claimed by the Omaha Indian Tribe, were obliterated and replaced by action of the Missouri River with the result, as contended by Petitioners, including the State of Iowa, that title passed out of the Omaha Indian Tribe and to their predecessors in interest, a "squatter" on the lands claimed by the Tribe?

4. Whether the Court of Appeals erred in placing the burden of proof under 25 U.S.C. 194 upon Petitioners, including the State of Iowa, who, rather than deraigning their claimed titles from patents, as they aver, traced their title to "squatter" Kirk, who entered upon the lands claimed by the Omaha Indian Tribe thus initiating the claim asserted by Petitioners, including the State of Iowa, by trespass?

5. Whether Petitioner State of Iowa, under Rules of the Supreme Court, may, for the first time, raise the issue of ownership to the bed of the Missouri River and the islands in that River within the area in dispute, concerning which Iowa offered no evidence in the trial of the case, did not seek or obtain findings by the trial court on the subject, and made no reference to the ownership of the bed of the stream or to islands in the Missouri River when the matter was before the Court of Appeals but relied solely upon the claim to title by quit claim deeds from Petitioners who, like Iowa, deraigned their titles from "squatter" Kirk?

6. Whether Petitioner Iowa, having been granted a Writ of Certiorari in regard to this question:

> "4. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries"

has, nevertheless, refrained from mentioning that question throughout its Brief and, having offered no authority in support of it, has effectively abandoned that question in these proceedings before the Court?

7. Whether the Court of Appeals erred in reversing the trial court which, while refusing to apply Federal law to these cases, applied the laws of Nebraska, based upon facts allegedly in support of findings prepared by Petitioners and adopted verbatim by the trial court, which findings were declared by the Court of Appeals to be "clearly erroneous"?

STATEMENT OF FACT [1]

Issue has been joined in these consolidated cases between the Omaha Indian Tribe and the United States of America, Respondents, with the Petitioners as to where title resides to 2900 acres of land now situated in the State of Iowa.

It is not denied by Petitioners that the United States and the Omaha Indian Tribe entered into the "Treaty with the Omahas, 1854." [2] Moreover, it is not denied

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[1] Numerous inaccuracies and misstatements are contained in the Briefs of the Petitioners, necessitating a review of the basic facts by the Respondent Omaha Indian Tribe. For ownerships, see Frontispiece, Tr.'s Ex. 78, R. Vol. I, p. 23.

[2] March 16, 1854, 10 Stat. 1043. See, Kappler, *Indian Affairs and Treaties*, Vol. II, pp. 611, *et seq.* NOTE: By the Treaty with the Omahas, March 6, 1865 (14 Stat. 667), the Omaha Indian Tribe ceded "a tract of land from the north-side of their reservation," which was used by the United States to create the Winnebago Reservation, March 8, 1867 (14 Stat. 671). See Kappler, pp. 872-4. Pursuant to the 1854 Treaty with the Omahas, there was established ". . . the centre of the main channel of said Missouri River. . . ." as the eastern boundary of the Omaha Indian Reservation. *In error,*

by Petitioners that 2900 acres, comprising the Blackbird Bend Oxbow, were once part of the Omaha Reservation, around which flowed the mainstream of the Missouri River.

Petitioners, while admitting the early history of what is referred to as the Blackbird Bend Oxbow, deny that the 2900 acres in question are the same lands which were part of the Omaha Indian Reservation. Rather, Petitioners assert the Blackbird Bend Oxbow was totally destroyed by the actions of the Missouri River and completely restored, in the Petitioners' words, "under the sky" by the new land created through the process of accretion to the Iowa riparian bank of the Missouri River.

Possession Of 2900 Acres Pursuant To Trial Court's Order

Respondents Omaha Indian Tribe and the United States of America, since April 2, 1975, have been and are in peaceful possession of the 2900 acres of land, which they

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Petitioners Wilson, *et al.*, state that the "outside boundaries" of the Omaha Indian Reservation were first surveyed by Barnum. (Pet.'s Br., p. 43, note 5) That statement is incorrect. As the record discloses, Barnum surveyed the north, south and west boundaries. Barnum did not survey the east boundary, which would have entailed meandering the ordinary high water mark of the Missouri River. Most assuredly, Barnum did not meander the River and, most assuredly, his survey could not, in any sense, change the center of the River as the location of the eastern boundary of the Omaha Indian Reservation, all as reviewed above. In error, Petitioners Wilson, *et al.*, refer to the Opinion of the Solicitor of the Department of Interior to represent to the Court the fact that the Solicitor determined that the center of the River was not the eastern boundary of the Omaha Indian Reservation. It is most important that reference be made to this miscitation by Petitioners Wilson, *et al.* In the Appendix at p. 108, the correct boundary of the Omaha Indian Reservation is set forth. At the bottom of p. 108, top of p. 109, the correct boundary of the Winnebago Indian Reservation is set forth. See, in that connection, Kappler, Vol. II, p. 872. At Article 2 of the Treaty, it will be observed that the Winnebago Indian Reservation is described. To represent to the Court that the Omaha Indian Reservation is described in the same manner as the Winnebago Indian Reservation is a most serious misstatement.

contend is now and has always been the lands constituting the Blackbird Bend Oxbow.[3] The trial court, Judge McManus presiding, in entering its Order of June 5, 1975, reviewed in some detail the status quo to be maintained between the Tribe and the Petitioners. On the subject, the trial court said this:

> "The record reflects that members of the Tribe have never totally acquiesced in defendants' use of the land, and the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years."[4]

Petitioner Lakin admitted not having paid taxes.[5] The trial court continued with its rationale in regard to the possession and occupancy of the Blackbird Bend lands by the Tribe and the United States by making this statement: "Perhaps the true uncontested status was many years ago before the Missouri River changed its course."

Continuing its analysis and establishing the predicate for the Order of June 5, 1975, the trial court stated:

> "But most significantly, the court views the present occupation by the Omaha Tribe, with the approval of the Tribal Council acting pursuant to its authority under 25 USC § 476, and with the assistance of the BIA acting in its capacity as an executive agency, *constitutes the status quo to be preserved.*"[6]

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[3] That peaceful occupancy and possession of the Tribe and the United States is predicated upon an Order entered June 5, 1975, by the United States District Court in Sioux City, Iowa. See Appendix, pp. 119-126. Petitioners' recital respecting the Tribe's possession ignores the fact that the issue was fully reviewed by the trial court prior to the issuance of the April 5, 1975 Order. See Pet's. Br., pp. 7-9.

[4] See Appendix, p. 124.

[5] *Ibid.*, at p. 234.

[6] *Ibid.* [Emphasis added]

As the trial court recognized in its Order of June 5, 1975—as the facts in the record of these complex cases disclose—the status of the title to the Blackbird Bend Oxbow will be governed very largely, if not entirely, by the history of the movements of the Missouri River over a protracted period of time.

Resume Of The History Of the Blackbird Bend Oxbow

When the Lewis and Clark Expedition, in September of 1806, passed through the ancient homeland of the Omaha Indian Tribe, it mapped the Blackbird Bend Oxbow. Elmer M. Clark, an expert witness for the Omaha Indian Tribe, utilized present day topographical information in his studies of river morphology of the Missouri River and related it to the mapping by Lewis and Clark. It is significant that the Blackbird Bend Oxbow and other natural monuments, located and described by Lewis and Clark and other early explorers, constitute some of the more important facts developed by the Omaha Indian Tribe in support of the Tribe's claims.[7]

In 1852, the ordinary high water mark of the Missouri River, along the east or Iowa bank of that stream, was meandered by A. Anderson, a Deputy Surveyor for the General Land Office, Department of the Interior. That was the first official survey by the General Land Office that mapped the left or Iowa bank of the Missouri River, the outside curve of the River, in its course around the Blackbird Bend Oxbow.[8]

A determination of the location of the center of the navigable channel of the Missouri River in its course

[7] See Tribe's Ex. 72; see, transcript, Vol. II, testimony of Elmer M. Clark, p. 180, lns. 10, *et seq.* (R. Vol. II, p. 187)

[8] Tribe's Ex. 84, 1852 A. Anderson Survey; see testimony of Elmer M. Clark, Vol. II, p. 167, lns. 21-25; p. 203, lns. 3-18; testimony of Charles S. Robinson, Vol. VI, p. 804, ln. 14—p. 805, ln. 20; p. 924, lns. 19-23

around the Blackbird Bend Oxbow was made in 1856. That reconnaissance expedition was conducted by Lieutenant G. K. Warren, Topographical Survey Agency of the United States Army.[9] Subsequently, in 1858, the "tie" of the Iowa and Nebraska cadastral surveys by the United States clearly delineated the Blackbird Bend Oxbow, around which the Missouri River made its course for so many years.[10]

Barrett Survey, Blackbird Bend Oxbow

During a period of extremely high water of the Missouri River in the months of April and May in the year 1867, T. H. Barrett, Deputy Surveyor, General Land Office, Department of Interior, undertook the first complete survey of the Omaha Indian Reservation.[11] As part of that survey, Barrett meandered the Missouri River at the high water mark in its course around the Blackbird Bend Oxbow. The plat prepared by Barrett of his meander of the Blackbird Bend Oxbow appears on Plate I, which immediately follows. The Barrett meander line encompasses the 2900 acres, title to which is the subject matter or res of these consolidated cases.

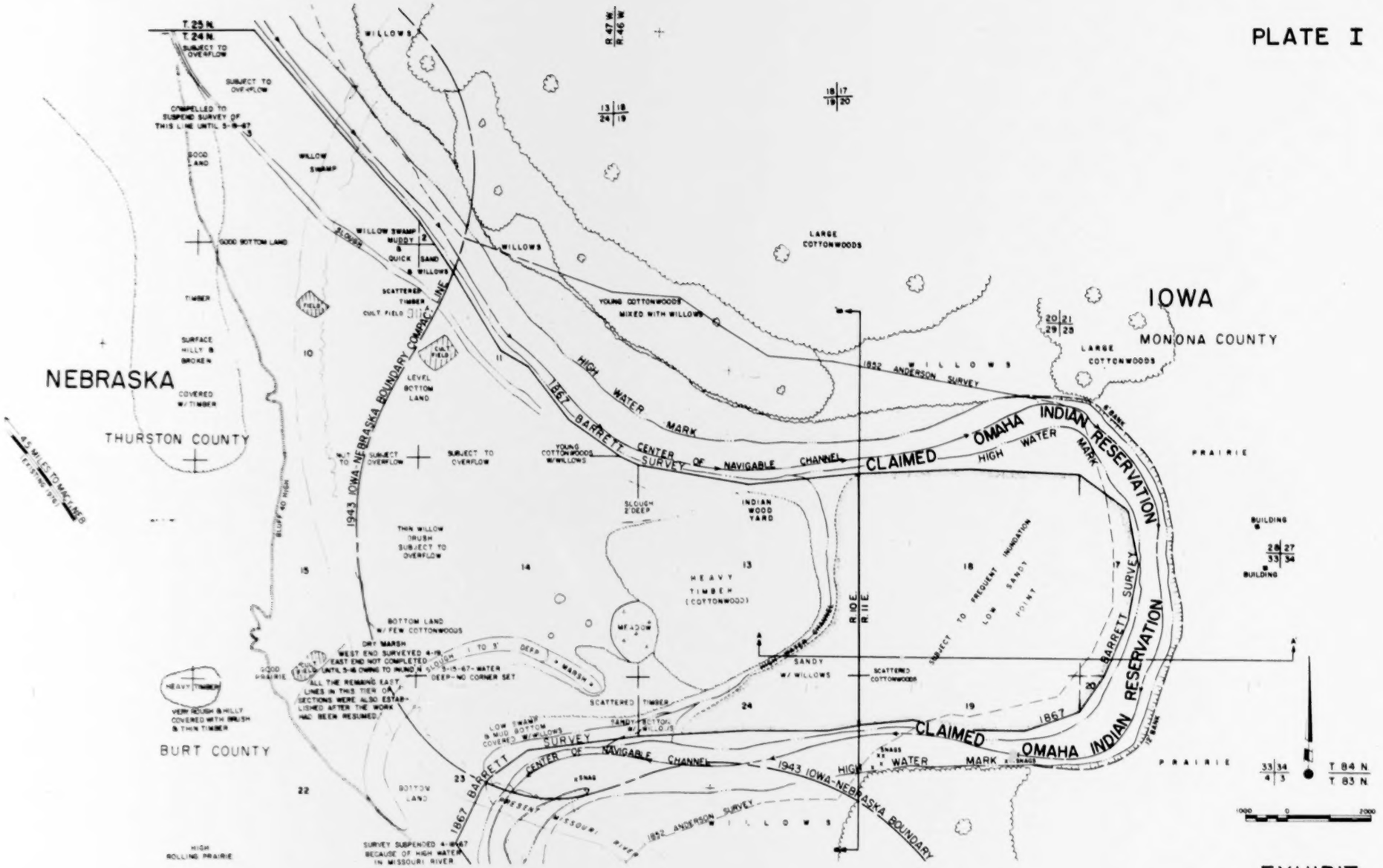
Barrett, in accordance with the rules and regulations of the Department of Interior, duly recorded observations of physical phenomena which pertained to the 2900 acres within the Blackbird Bend Oxbow. As depicted on Plate I, Barrett recorded in his field notes that a high water channel transected it at a point east of the common line between Ranges 10 and 11 West. This is what Barrett reported in his notes:

[9] Tribe's Ex. 94; transcript, Vol. II, testimony of Elmer M. Clark, pp. 179, *et seq.*

[10] Appendix, p. 205; Tribe's Ex. 23 & 94; transcript, Vol. II, testimony of Elmer M. Clark, pp. 181, *et seq.*

[11] See p. 5, note 2, *supra*. Tr.'s Ex. 95, R. Vol. VII, p. 904, ln. 1.

PLATE I



PORTION OF TRIBE'S EXHIBIT "95"

EXHIBIT

TRACT 1 BLACKBIRD BEND AREA
1867 T.H. BARRETT SURVEY (APRIL & MAY)
WITH
MISSOURI RIVER HIGH WATER MARK
AND
1867 NAVIGATION CHANNEL (JULY)
WITH
GEOLOGIC MAP

C.S. ROBINSON & ASSOCIATES
GOLDEN, COLORADO

E.M. CLARK & ASSOCIATES
DENVER, COLORADO

> "Until very recently, appearances indicated that this point [Blackbird Bend Oxbow] was increasing in size from the deposits and drift of the river; but, during the present season, the river, rising to a great height, partly worked a channel across it, which may, eventually, entirely detach it from the Nebraska shore, rendering it an island in the river." [12]

Subsequently, reference will be made to the fact that Barrett's prediction that the Missouri River would transect a portion of the Blackbird Bend Oxbow was accurate.

Barrett's 1867 Allotment Survey

Barrett, in addition to meandering the Blackbird Bend Oxbow, established the legal subdivisions within the area in question. West of the common line, between Ranges 10 and 11 West, Barrett subdivided the sections of land into 80-acre allotments. As will be reviewed, the individual Omaha Indians entered upon those allotments and occupied them for a great many years.

The 1879 Survey Of The Blackbird Bend Oxbow

The Easterly High Bank is the furthest point to the east that the Missouri River eroded into the left or Iowa bank of the River. That easterly migration of the Missouri River around the Blackbird Bend Oxbow occurred not later than the year 1875. While the Missouri River was eroding the lands in the State of Iowa, it was adding by accretions to the Blackbird Bend Oxbow.[13]

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[12] App. p. A53; 575 F.2d 645. R. Vol. I, p. 22, ln. 19. See Tr.'s Ex. 26e, p. 6; See Tr.'s Ex. 95; R. Vol. VII, p. 904, ln. 1.

[13] App., p. A8; 575 F.2d 624. There is no disagreement as to the Tribe's description that:

> "The Easterly High Bank is a natural monument demarking the furthest point of progression of the eastern migration of the

The Missouri River Commission, from June 16 to June 26, 1879, during a period of extremely high flow, made an intensive investigation of the Missouri River in its course around the Blackbird Bend Oxbow. There follows this page Plate II, which discloses the flood-stage of the Missouri River and the thalweg of the stream at that time.[14] That exhibit establishes the course of the River after it had left what has been referred to as the Easterly High Bank. The evidence proves the sudden and abrupt departure of the Missouri River from the bed of its stream situated at the toe of the Easterly High Bank.[15]

Too great stress may not be placed upon the fact that, during the period of June 16 to June 26, 1879, the Missouri River was out of its banks. In the words of the court below, predicated upon the record, the Missouri River, during that period was ". . . almost 10,000 feet wide covering as much as two-thirds of the Barrett Survey. . . ." [16] After the flood-stage, the Missouri River normally occupied a bed 800 feet in width.[17] The Missouri River Commission, in its survey, discloses that "The thalweg had shifted from against the easterly high bank to a point nearly 6,000 feet to the west." [18] It is clear that the years 1875 and 1879, which were years

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Missouri River from the eastern boundary of the 2900 acres, as surveyed by Barrett in 1867.

"It commences at a point on the Easterly High Bank located approximately 2,200 feet southwesterly from the corner common to Sections 20, 21, 28 and 29, T. 84 N., R. 46 W. of the 5th P.M., continuing down said Easterly High Bank a distance of approximately 3½ miles to a point on the Easterly High Bank approximately 4,900 feet northwesterly of the common corner of Sections 4, 5, 8 and 9, T. 83 N., R. 46 W. of the 5th P.M.

[14] See Tribe's Ex. 29; R. Vol. III, p. 285, lns. 20-21.

[15] See p. 14, *infra*.

[16] App. p. A8; 575 F.2d 624.

[17] *Ibid.*

[18] See pp. 11-12, note 13, *supra*.

PLATE II

EXHIBIT

1879 MISSOURI RIVER COMMISSION SURVEY

PORTION OF TRIBE'S EXHIBIT "29"

of extremely high flow, contributed to the Missouri River abruptly and suddenly and permanently abandoning its well-defined 1875 channel at the foot of the Iowa Easterly High Bank, all as predicted by U.S. Deputy Surveyor T. H. Barrett.[19] Because the Missouri River abruptly abandoned its 1875 deeply incised channel, there were no accretions to the riparian Iowa bank of the Missouri River. Simply stated, the Missouri River did not deposit soil, sand and gravel along the Easterly High Bank, the constituents of accretions.[20] It must be stressed that the abandoned 1875 channel and the total absence of accretions to the Easterly High Bank constitutes phenomena that are present today, concerning which the witnesses for the Tribe testified at length, all as cited above.[21] That evidence was introduced and effectively overcame any presumption of accretions that might have arisen under Iowa law, assuming the applicability of that law, which is denied.[22]

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[19] See p. 11, *supra*, Barrett's prediction of the avulsion. See also testimony of Charles S. Robinson, Vol. VII, p. 925, lns. 9-24; Tribe's Ex. 96.

[20] Testimony of Charles S. Robinson, Vol. VIII, p. 1002, lns. 17-25. See Tribe's Ex. 101b. See also Hallberg, cross-examination, Vol. XIXX, p. 2819, ln. 11—p. 2820, ln. 13. Tribe's Ex. 99.

[21] See Pet.'s witness Hallberg, cross-examination, Vol. XIXX, p. 2668, lns. 14-17; Wilson's Ex. V-8 and testimony of Government's witness, Vol. XIII, p. 1722, ln. 22—p. 1723, ln. 17. See Government's Ex. 151, which is Wilson's Ex. V-8.

[22] Tribe's evidence, proving that there were no accretions to the Easterly High Bank, effectively overcomes the presumption of accretion, to which reference has been made. See, in that connection, App., p. A24, note 22; 575 F.2d 632-33.

Under the Federal Rules of Evidence, "a presumption loses its vitality once sufficient evidence on a disputed issue has been presented to permit a fact finder to act upon it (citations omitted). The Tribe having presented substantial conflicting evidence on the

In error, Petitioners, relative to the Missouri River movement during the June 1879 mapping by the Missouri River Commission, said this:

> "By 1879 when the Missouri River Commission mapped the Missouri in this area . . . the eastern mile of the south side and two miles of the north side of Barrett's meander lobe had disappeared, and the thalweg of the river was running through that area." [23]

That statement is belied by the 1879 map, Plate II, and the comments which follow. Throughout, Petitioners confuse the fact that the Missouri River historically overtopped its banks during flood periods and receded without affecting the inundated lands.

1884 Allotments Assigned To Omaha Indian Members And Their Occupancy Of The Blackbird Bend Oxbow

Disproving the last quoted statement by Petitioners, these facts are most relevant: In 1884 and again in 1900, individual Omaha Indians were assigned allotments on the Blackbird Bend Oxbow.[24] The allotments, which were

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issue of accretion, any presumption of accretion disappeared and had no further effect on their case."

An Anomaly: The trial court—Judge Bogue presiding—applied the laws of Nebraska to these cases. In the last cited footnote, the court below reviewed and commented upon the laws of Iowa and Nebraska. It points out that there was a common law presumption in favor of a finding of accretion. The anomaly is this: The trial court applied Nebraska law and, as the court below points out "No such presumption [in favor of accretions] exists under Nebraska law." See App., p. A24, note 22; 575 F.2d 632-33; see App., pp. C2, *et seq.*

[23] Pet.'s Br., p. 14.

[24] Testimony of Charles P. Corke, transcript, Vol. I, p. 86; see Tribe's Ex. 80. NOTE: The map attached to the Brief of Petitioners Wilson, *et al.*, is purely fabricated. Statements set forth in what

occupied by the individual Omaha Indians were made available to them pursuant to regulations established by the Secretary of Interior. Comment has already been made that the allotments were surveyed by Barrett in 1867.

From 1884 into the 1920s, lands in the Blackbird Bend Area were occupied and farmed by individual members of the Omaha Indian Tribe. The erroneous character of the last quoted excerpt from Petitioners' Brief is underscored by the occupancy of the Omaha Indians of the Blackbird Bend Area, which Petitioners, in error, allege was largely washed away, all as reviewed.[25]

Blackbird Bend Oxbow From 1890 to 1923

A momentarily stabilized Missouri River is depicted by the Missouri River Commission Map of 1890,[26] which is Plate III, following this page. Large areas of accretion to the north and east of the Barrett line are set forth on that map.[27] The center of the navigable channel is well to the north and east of the common line between Ranges 10 and 11 West, which intersect the Blackbird Bend Oxbow.

During the 1890 to 1912 period, the Missouri River moved to the north and east. Throughout that period,

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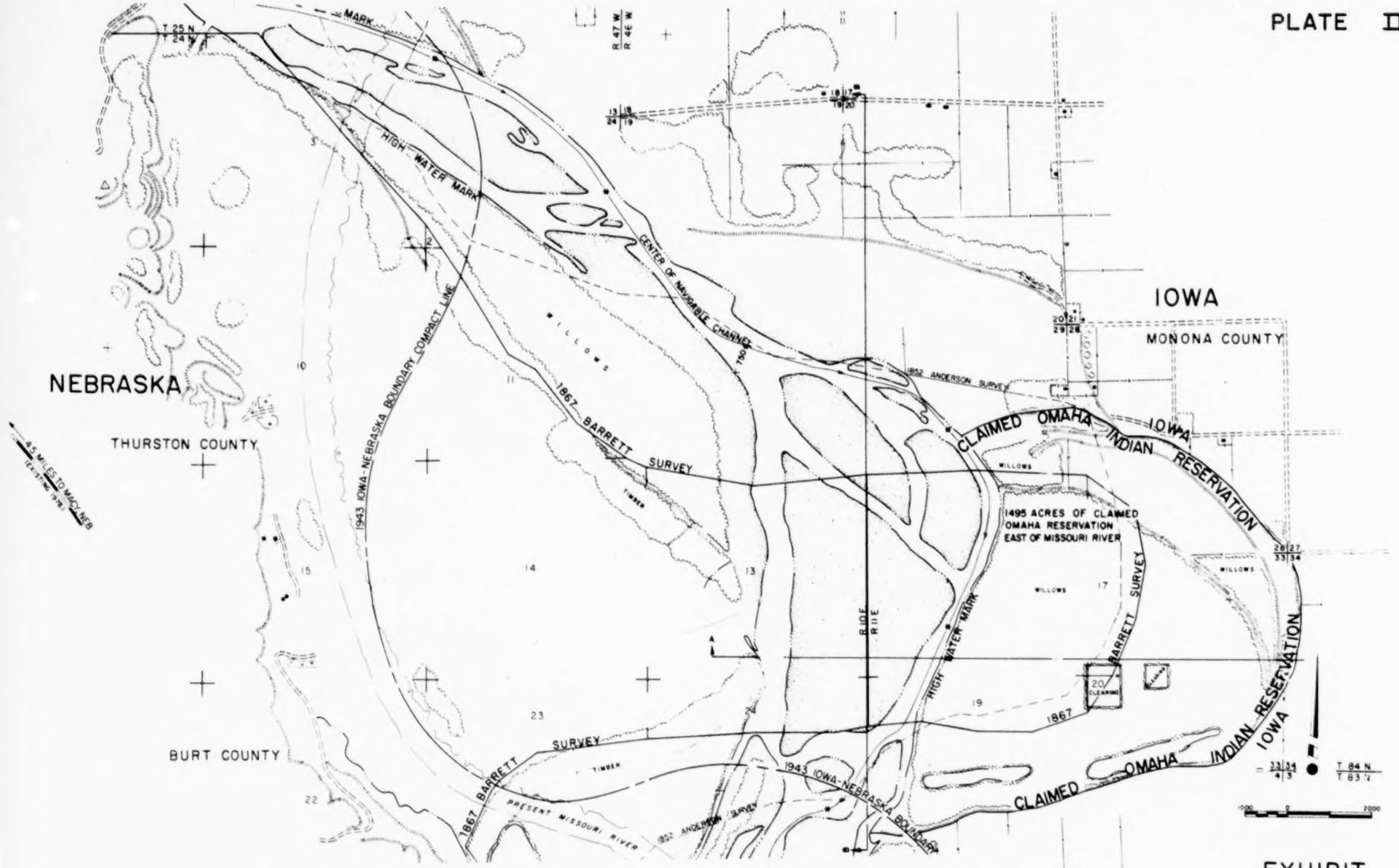
purports to be a legend are clearly in error and are not supported by the evidence. Under normal circumstances, it would be appropriate for the Tribe to move to strike that fabricated map. It will suffice to bring to the Court's attention that the map, as tendered, is in no sense any part of the evidence in these consolidated cases. It does prove, of course, that the lands were occupied for a long period of time by Omaha Indians. However, the references to fee patents and related data should be ignored because they are contrary to the facts in the record.

[25] See Petitioners' quoted statement cited at p. 15, note 23, *supra*.

[26] See Tribe's Ex. 101. R. Vol. VIII, p. 1024, ln. 4.

[27] See Plate III, p. 17, *infra*.

PLATE III



PORTION OF TRIBE'S EXHIBIT "101"

EXHIBIT

TRACT I, BLACKBIRD BEND AREA

1890 MISSOURI RIVER HIGH WATER MARK
AND
GEOLOGIC MAP
WITH NAVIGATION CHANNEL

C.S. ROBINSON & ASSOCIATES
GOLDEN, COLORADO

E.M. CLARK & ASSOCIATES
DENVER, COLORADO

accretions were being added to the Blackbird Bend Oxbow. That northerly and easterly migration of the Missouri River continued from 1890 until some brief time after 1912 and washed away for all times the lands surveyed in that area by Anderson in 1852.[28] Petitioners do not contest the fact that a large area of land accreted to the Blackbird Bend Oxbow when the Missouri River moved north and east.

The Missouri River, having moved to the Northerly High Bank, suddenly and abruptly left its deeply incised channel at the foot of that bank. On the subject, the Court of Appeals made this statement:

> "First, it is clear that the thalweg had moved substantially in a relatively short period of time; perhaps as few as three years, but no more than 11 years." [29]

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[28] Tribe's Ex. 103; Defendant Wilson's Ex. Q-8. See testimony of Charles S. Robinson, Vol. XIII, p. 1008, lns. 1, *et seq.*; p. 1027, lns. 11-22; p. 1034, lns. 21-23; p. 1046, ln. 21—p. 1047, ln. 5; p. 1047, ln. 23—p. 1048, ln. 6. Testimony of Elmer M. Clark, Vol. IV, p. 448, lns. 12—p. 449, ln. 25.

[29] See Def. Wilson's Ex. Q-8, locating the Northerly High Bank, which has been described as follows: "a natural monument demarking the furthest migration northward of the Missouri River from the northern boundary of the 2900 acres as surveyed by Barrett in 1867....

> "The course of the Northerly High Bank is described as follows: The Iowa Northerly High Bank runs southeasterly through SE2 of Section 13, T. 84 N., R. 47 W. and continuing through the NE4 of Section 24, T. 84 N., R. 47 W., then easterly through the NW4 and the N2NE4 of Section 19, T. 84 N., R. 46 W., thence southerly approximately 2,000 feet through the E2 NE4 of Section 29, T. 84 N., R. 46 W., terminating at the point of intersection of the Iowa Easterly High Bank. . . ."

See also App., p. A56; 575 F.2d 646, where the court says: "After 1890 the river moved in a northerly and easterly direction to a position shown as the northerly high bank in approximately 1912."

The Tribe offered comprehensive evidence on the subject.[30] The Tribe's intensive geologic and soil investigation, along the entire length of the abandoned channel at the foot of the Northerly High Bank, proved this fact: There were no accretions to the riparian lands along that bank.[31]

The assertions by the Tribe and the United States that the Blackbird Bend Oxbow was not washed away and replaced with other lands, as Petitioners contend, is fully supported by the evidence. Every map in the record of these consolidated cases locates and defines the Blackbird Bend Oxbow as surveyed by Barrett in 1867. The Plates made a part of this Brief were part of the Tribe's exhibits in these cases.

In regard to the movement of the River, after 1912, reference is again made to Plate I,[32] the Barrett Survey of 1867. It will be observed along the western extremity of the Blackbird Bend Oxbow that Barrett mapped the low areas. Those areas were old channels of the Missouri River. There is strong evidence that when the Missouri River abruptly and suddenly abandoned its 1912 channel at the foot of the Northerly High Bank, it reoccupied one or more of those old channels.

The United States Corps of Engineers published a map of the area in 1923. From that map, it will be observed that the course of the Missouri River and the thalweg of that stream had drastically changed. That comparison can be accomplished by viewing the 1890 River location on Plate III with the 1923 River, which

[30] Appendix, pp. 208, *et seq.*, testimony of Elmer Clark relative to the absence of accretions to the Northerly High Bank.

[31] Appendix, pp. 219-220, testimony of Dr. Charles S. Robinson; see also Tribe's Ex. 103d, based on soils and geologic testing, proving that no accretions attached to the Northerly High Bank.

[32] Tribe's Ex. 95. R. Vol. IV, p. 904. See Vol. XXI, p. 3128, lns. 22-24; p. 3129, ln. 6; p. 3130, lns. 8-11. See, testimony of Dr. Charles S. Robinson, Vol. XXI, p. 3198, lns. 12-17; p. 3198, ln. 24—p. 3199, ln. 5.

appears on Plate IV, which immediately follows.[33] One of the great obstacles to Petitioners Wilson, *et al.*, who had by affirmative defenses asserted the destruction of the Blackbird Bend Oxbow and the replacement of it by accretions from the Northerly and Easterly High Banks, is the facts disclosed on the 1923 map. It will be observed on Plate IV that the Blackbird Bend Oxbow, far from being destroyed, was very much in place. It was not at that time nor was it previously destroyed, all as asserted by the Petitioners Wilson, *et al.*, in their affirmative defenses, concerning which they had the obligation to prove, all as will be reviewed.

In 1927,[34] the United States Corps of Engineers published another map of the Blackbird Bend Area. It will be observed that the Missouri River was braided and that Blackbird Bend lands remained in place. Equally important, moreover, is the fact that northeasterly and to the east of the Barrett Survey were substantial areas of accretion to the Barrett survey lands—not to the Iowa lands—all as set forth on Plates III, above, and IV and V, which follow.

Stability Of The Blackbird Bend Oxbow— A Most Crucial Fact

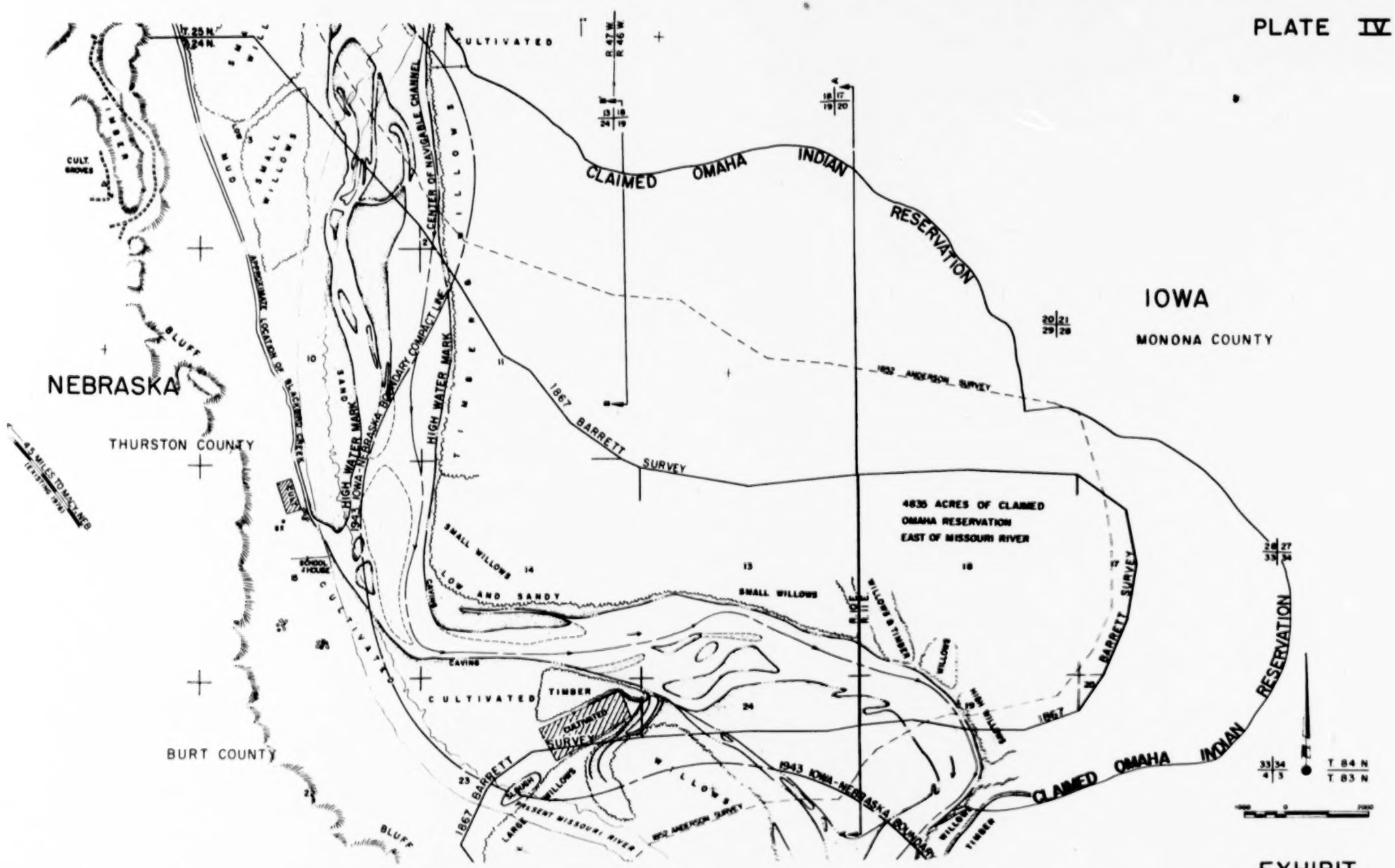
In error, Petitioners Wilson, *et al.*, assert that the Tribe and the United States claim that ". . . this 2900 acres [the Blackbird Bend Oxbow] came into existence on the east side as the result of avulsive actions of the River."[35] Again, in error, Petitioners state that the

[33] Tr.'s Ex. 105, R. Vol. III, pp. 344-46. See Vol. IV, p. 550, lns. 10-21; p. 551, lns. 8-19; Vol. V, p. 641, ln. 2—p. 642, ln. 8; p. 642, ln. 16—p. 644, ln. 18; p. 645, ln. 8—p. 647, ln. 5; p. 651, ln. 25—p. 652, ln. 17; Vol. X, p. 1323, ln. 2—p. 1324, ln. 7. Dr. Charles Robinson, Vol. VIII, p. 1060, ln. 15—p. 1061, ln. 4; p. 1066, ln. 19—p. 1067, ln. 13.

[34] Tr.'s Ex. 106, R. Vol. IV, p. 436, ln. 24.

[35] Petitioner Wilson's Brief, p. 4.

PLATE IV



PORTION OF TRIBE'S EXHIBIT "105"

EXHIBIT

TRACT 1 BLACKBIRD BEND AREA

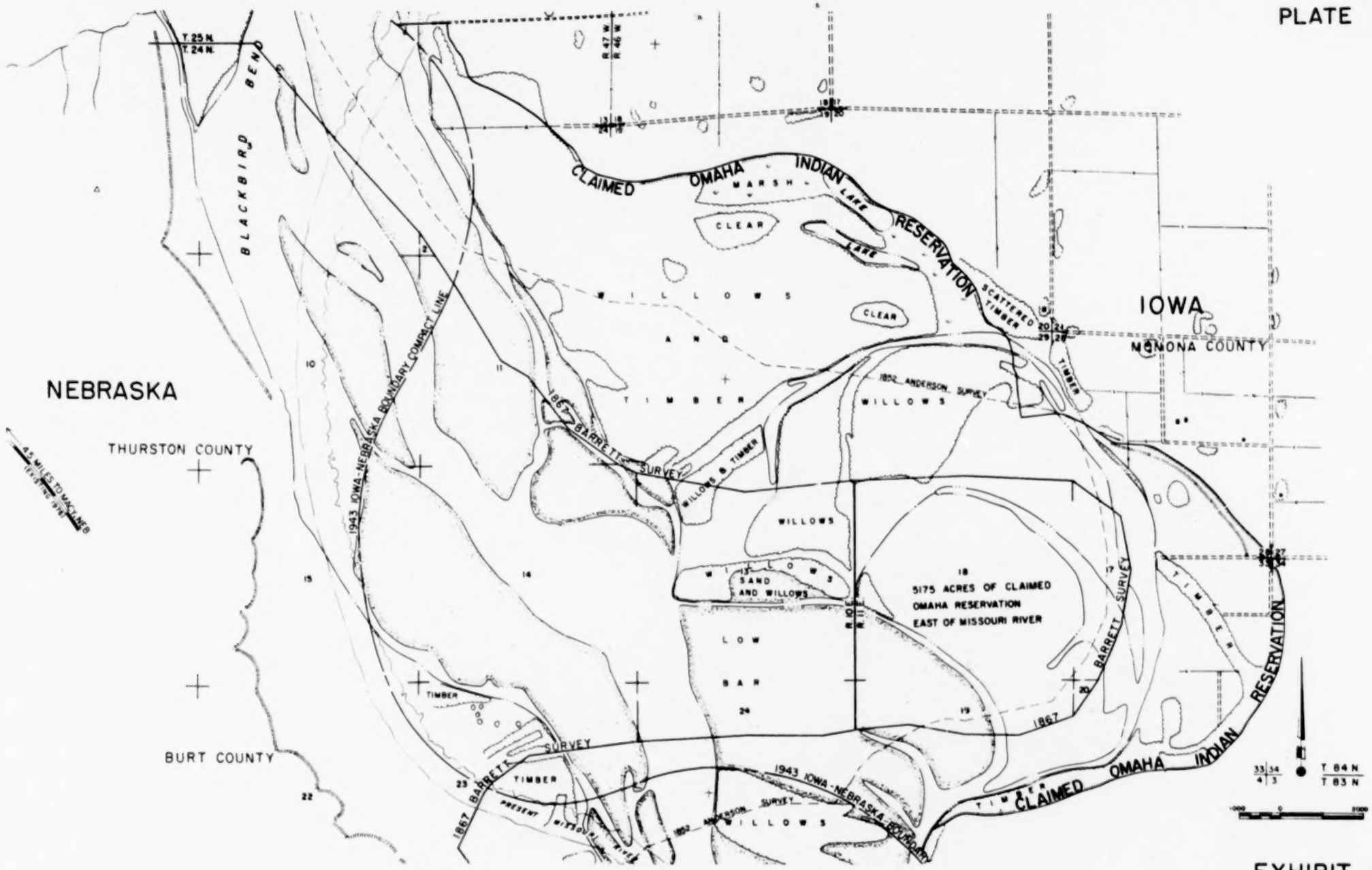
1923 MISSOURI RIVER HIGH WATER MARK
(SEPTEMBER)

AND

GEOLOGIC MAP

E.M. CLARK & ASSOCIATES
DENVER, COLORADO

PLATE V



EXHIBIT

TRACT 1 BLACKBIRD BEND AREA

1927 MISSOURI RIVER HIGH WATER MARK
(JANUARY)

PORTION OF TRIBE'S EXHIBIT "106"

E M CLARK & ASSOCIATES
DENVER, COLORADO

eastern end of the "Barrett Survey area disappeared from the Nebraska side and appeared on the Iowa side . . . ." and that the Tribe and the United States contend that "Essentially all of the rest [the Blackbird Bend Oxbow] appeared on the Iowa side of the River during the period of 1906 to 1927." [36] There is not a scintilla of accuracy in either statement.

A resumé has been set forth in substantiation of the remarkable stability of the lands comprising the Blackbird Bend Oxbow from the time of Lewis and Clark to Barrett and on through the 1927 period when the Missouri River cut an entirely new channel west of the Blackbird Bend Oxbow.

All of the evidence supports the fact that the Blackbird Bend Oxbow survived all of the violent vagaries of the Missouri River, as asserted by the Omaha Indian Tribe. In a state of nature, the rampaging Missouri River created meander lobes—oxbows—and destroyed them with short shrift. Hence, it becomes important to seek the explanation of the continued existence of the Blackbird Bend Oxbow down through many years.

Dr. Charles S. Robinson testified at length in regard to the elements that contributed to the continued existence of the Blackbird Bend Oxbow in the most destructive of all rivers.[37] As previously stated, the River, in its course

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[36] *Ibid.*, at p. 5.

[37] Appendix, p. 213: "The river could not move southward because of the erosion resistant bank along the south limb of it [the Blackbird Bend Oxbow] and the force of the river has been—well, it's been directed farther and farther east. It's getting so that the river has to go around tighter and tighter bends as the bend extends itself to the east and the river then as a result, in part, started to erode along or about in the position of the previous—the high water channel, which had been shown on the 1856 Warren map and also as shown on the Exhibit 95, the 1867 Barrett Survey and the Macomb map."

around Blackbird Bend, was "approximately 800 feet" in width.[38] Dr. Robinson then testified with specificity as to the kind and type of soils that were resistant to erosion and which aided in the Blackbird Bend Oxbow surviving down through the years.[39] Recognition was taken by the court below of the physical phenomenon that caused the Blackbird Bend Oxbow to be maintained in the River for such an extended period of time:

> "The evidence also demonstrated that the Iowa south bank of the Blackbird Bend area was composed of erosion resistant material which would have prevented the southerly movement of the meander bend and made a cut-off possible." [40]

As pointed out by the court below, the presence of erosion-resistant material on the south bank of the course of the Missouri River around the Blackbird Bend Oxbow has been established scientifically as a reason for the continuity of the Blackbird Bend Oxbow. On the subject, this scientific statement has been made: "For a natural cut-off to develop, erosion on the down-stream bank of the lower arm of a bend [in the stream's course around the oxbow] must be slower than along the upper arm." [41] Thus it is that the destruction of the Blackbird Bend Oxbow did not occur. Rather, during a period of high flow, all as presaged by the presence of a high water channel mapped by Barrett, the River simply cut through the Blackbird Bend Oxbow, leaving land both east and west of the Missouri River after the high flow of 1879.[42]

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[38] Appendix, p. 216.

[39] Testimony of Dr. Charles S. Robison, Vol. VII, p. 942, lns. 6-19.

[40] App., p. A54; 575 F.2d 645.

[41] App., p. A52; 575 F.2d 644-45.

[42] See p. 11, *supra*.

"Squatter" Joseph A. Kirk Is Principal Source Of Title For Petitioners Wilson, Lakin, Jackson (Wilson's Lessee)— Not Patents As Asserted [43]

By its sudden, abrupt and drastic change resulting in its 1923 position, as shown on Plates IV and V above, the Missouri River had, while leaving it largely intact, severed all of the Blackbird Bend Oxbow together with accretions to it from the right or Nebraska shore of that River. Thus, a very substantial segment of the Omaha Indian Reservation was separated from the remainder of the Reservation by a totally wild and uncontrolled stream. There was no bridge across the Missouri River offering access to the Omaha Indians to the land. More than a quarter of a century passed from the change of the course of the River before access to the lands in question would be provided.[44]

The Court, in its 1972 *Nebraska* v. *Iowa* Opinion, "refers to a project begun in the early 1930's by the United States Army Corps of Engineers to tame the river . . ." in the area of Blackbird Bend and elsewhere.[45] Later, the Corps of Engineers would reduce the Missouri River to a channelized, totally controlled stream. Those changes moved the stream farther west resulting in the Blackbird Bend Area becoming highly attractive for squatters, which gave rise to this litigation. It was that metamorphosis from a wild stream in the 1920s to the completely controlled stream of the present day which caused the trial court to make this statement in its Order of June 5, 1975: "Perhaps the true uncontested status was many years

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[43] "Squatter" is defined as "one who settles on land without right or title." *Webster's Third New International Dictionary, Unabridged; Black's Law Dictionary, Revised, Fourth Edition.*

[44] Tribe's Ex. 44, R. Vol. III, p. 307, lns. 8-10, 1946-1947, no bridge to Blackbird. Bridge built in 1956.

[45] Nebraska v. Iowa, 406 U.S. 117, 119 (1972).

ago before the Missouri River changed its course." [46] Petitioners Wilson, Lakin and Jackson (Wilson's lessee), in error, make this statement:

> ". . . Petitioners here. . . . . claim the land as accretion to Iowa riparian land and their chains of title go back to patents from the Government to that riparian land. The exception is the State of Iowa which claims part of the land as accretions to Iowa's portion of the bed of the River." [47]

There will now be reviewed the magnitude of the error in that statement by Petitioners.

Rather than deraigning their titles "back to patents," Petitioners Wilson, Lakin and Jackson (Wilson's lessee) can only trace their claims to a "squatter" on the Blackbird Bend lands named Joseph A. Kirk. He is the source of their title.[48] The basis for the Kirk claim is simply that he allegedly occupied the land for the Iowa statutory period for acquiring title by adverse possession.[49] Kirk did not hold title predicated upon patents to the lands in question. Kirk first appears in the chain of title (offered in evidence by Petitioners) on May 4, 1925, when he

[46] Appendix, p. 124.

[47] Pet.'s Br., p. 4.

[48] Petitioners Wilson, *et al.*, offered extensive testimony in regard to a large but undefined area "squatted" upon by Joseph A. Kirk. See Appendix, pp. 234 *et seq.*, and additional references from those sources in the transcript.

[49] See, in that connection, the trial court's April 5, 1976 Order, in which the trial court granted the Tribe's Motion for Partial Summary Judgment on the grounds that the affirmative defenses of State statutes of limitation, adverse possession and acquiescence are not available to Petitioners under the circumstances of these cases. On the subject, the court ruled: "As stated above, state statutes of limitations cannot effect adverse possession of lands held in trust by the United States for the benefit of Indian tribes. Similarly, state rules of laches, estoppel, or abandonment have no applicability to the title dispute in the instant action." Appendix, April 5, 1976 Order, pp. 184, 188.

recorded a quit claim deed dated April 20, 1925. In 1929, Kirk quieted title in himself. In 1948, Kirk conveyed to Raymond G. Peterson who, by subsequent transfers and conveyances, vested title to part of the land Peterson had acquired in Petitioner Charles E. Lakin, who subsequently transferred most of his lands to Petitioner Roy Tibbals Wilson.[50] The Frontispiece locates the lands

[50] See Wilson's Ex. W and R.G.P.'s invalid Exhibits X, Y, and Z, purporting to be abstracts of title disclosing title from "squatter" Joseph Kirk to Peterson, Wilson, Lakin, et al. (Wilson Ex. W; R.G.P. Ex. X, R. Vol. XIII, pp. 1788-89).

QUIT CLAIM DEED from H.A. and W. Evans to Joseph A. Kirk, April 20, 1925.

QUIET TITLE DECREE, Whitney v. Kirk, on Joseph A. Kirk, March 8, 1929. Neither the Omaha Indian Tribe nor the United States is named.

CONTRACT OF PURCHASE between Joseph A. Kirk and Henry K. and Raymond G. Peterson, January 2, 1948.

ASSIGNMENT from Henry K. and Raymond G. Peterson to Jack M. Pace and Harold R. Bookstrom, June 30, 1953, for one half interest in all the land described in Contract dated January 2, 1948.

CONTRACT between Jack M. Pace and Harold R. Bookstrom to Charles E. Lakin, May 6, 1959, for one half interest in all the land described in the Assignment dated June 30, 1953, and conveyances recorded in Book 72 at pages 217 and 223.

AGREEMENT to partition by Charles E. Lakin (Petitioner), Henry K. and Raymond G. Peterson, October 31, 1959.

QUIT CLAIM DEED from Henry K. and W. Peterson to Raymond G Peterson, February 17, 1961.

QUIET TITLE DECREE, Charles E. Lakin (Petitioner) v. State of Iowa (Petitioner), Equity No. 17400, November 15, 1963. Neither the Omaha Indian Tribe nor the United States is named.

QUIT CLAIM DEED from Charles E. Lakin (Petitioner) to State of Iowa (Petitioner), May 24, 1965.

WARRANTY DEED from Charles E. Lakin (Petitioner) to Roy Tibbals Wilson (Petitioner), May 18, 1972.

Quite obviously, the Peterson title can rise no higher than the "squatter" title that he acquired from Joseph A. Kirk. Upon the death of Raymond G. Peterson, the heirs incorporated establishing an entity using the initials "R.G.P.," which, of course, has reference to Peterson, grantee from Kirk and grantor to Lakin or to Lakin's predecessor.

R.G.P., Inc., filed a Petition for Certiorari—No. 78-162. That Petition was not granted. Hence, R.G.P., Inc., is not before the Court.

claimed by the Petitioners. It is abundantly manifest that Petitioners Wilson, *et al.*, did not deraign their title from patents from the United States Government. Absence of patents in Petitioners' chain of title forced upon them their implausible affirmative defenses, which they did not and could not sustain with evidence at the trial on the merits. Under the circumstances, it is respectfully urged, that Petitioners' claim to title, based upon patents, is contrary to the evidence which clearly shows that Petitioners' source of title is "squatter" Kirk.

Petitioner State Of Iowa Traces Its Title To "Squatter" Joseph A. Kirk

There was qouted above the statement that Iowa "claims part of the land as accretions to Iowa's portion of the bed of the River." [51] Iowa did not offer evidence to prove any accretions to any portion of the bed of the Missouri River. Iowa's claimed title to the lands which are within the Barrett Survey line stems from a quit claim deed from Raymond G. Peterson and wife.[52] A portion of the lands claimed by Iowa was conveyed to the State by Charles E. Lakin and wife. Hence, "squatter" Kirk is the source of Iowa's title, for, as stated, the sole source of Petitioner Lakin's title is Kirk.

In connection with the claims of the State of Iowa, reference is made to the questions set forth in its Petition for a Writ of Certiorari. Question "4," presented by the State of Iowa in its petition for the writ in question, reads as follows:

> "4. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries." [53]

[51] See, p. 27, note 47, *supra*.

[52] See, Appendix, p. 262.

[53] Petition for a Writ of Certiorari, filed by State of Iowa, No. 78-161, p. 3.

Response to that inquiry would necessarily involve an analysis of the title of "squatter" Joe Kirk. Further reference is made to the Brief filed by the State of Iowa, which does not seek to test the issue of whether Federal law could divest Iowa's apparent good title. Rather, the question now presented by the State of Iowa is:

> "2. Whether the Court of Appeals' decision violates established principles of Federalism." [54]

The Tribe is proceeding on the basis that the issue of Iowa's title is no longer before the Court.

Petitioners' Harold M. Sorenson, Et Al., Claimed Title Before The Court Is Not Deraigned From Patents [55]

Petitioner Sorenson is claiming a substantial acreage in the western extremity of the Blackbird Bend, which was surveyed by Barrett. It is worthy of note that some of the lands claimed by Iowa and Sorenson were, until very recently, leased by Petitioner Sorenson from Respondent Omaha Indian Tribe.[56] It is likewise of interest, in regard to the particular land to which reference is here being made, that Sorenson is contesting with the State of Iowa relative to those lands. As noted above, the State of Iowa deraigns its title from "squatter" Joe Kirk.[57] It is the position of the Tribe that neither the claims of Iowa nor Sorenson has any validity. Most assuredly, the title of Iowa cannot rise any higher than that deraigned from Joe Kirk. If Sorenson's claim is on the basis of adverse possession, it is manifest that such

[54] Petitioners' Brief on the Merits, filed by State of Iowa, No. 78-161, p. 4.

[55] All of Petitioner Sorenson references in this Brief refer to Harold Sorenson for he is the party claimant.

[56] See Sorenson's Exhibit U-5.

[57] See Frontispiece, portion of Tribe's Ex. 78, Exhibit: Tract I, Blackbird Bend Area, Landownerships compiled from Defendants' Answers, Case C75-4067.

a claim has no standing as against the Omaha Indian Tribe and the National Government, which claims are predicated upon the Treaty of 1854.[58]

In the extreme northeastern portion of the Blackbird Bend Area, surveyed by Barrett in 1867, is a parcel of land claimed by Petitioners Harold Sorenson, *et al.*[59] Petitioner Sorenson's claim to that property is unclear. That it is not predicated upon patent is too clear for question. From an examination of the record, it is possible that Sorenson's claim is based upon an Affidavit of Possession, at least in part.[60]

Petitioners Assert Affirmative Defenses That The Blackbird Bend Oxbow Was Washed Away And Replaced By Accretions; Counterclaim For Quiet Title Decree Against The Omaha Indian Tribe

The inceptive action, in these consolidated cases, was initiated by Petitioner Harold Jackson, a "white person," against Edward L. Cline, an individual Omaha "Indian." That action was an injunction proceeding in the District Court of Iowa in and for Monona County, *Harold Jackson, et al.* v. *Edward L. Cline, et al., Defendants*, Equity No. 8965.

On May 16, 1975, the Monona County Court granted the request of Petitioner Jackson, a "white person," and ordered the issuance of a Writ of Injunction prayed for by Petitioner Jackson against Edward L. Cline. As an individual Omaha Indian, Mr. Cline was enjoined and restrained from occupying the Blackbird Bend Area encompassed within the Barrett Survey of 1867.[61]

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[58] See note 50, p. 27, *supra*. See note 49, p. 26, *supra*.

[59] See note 57, p. 29, *supra*.

[60] Exhibit H-7, copy of "Affidavit of Possession, signed by Harold M. Sorenson, regarding Section 29 lands."

[61] Appendix, pp. 117-118.

On May 20, 1975, the Omaha Indian Tribe petitioned the Federal District Court in Sioux City, Iowa, for an injunction against Petitioner Jackson to restrain him from interfering with the Tribe's occupancy of the 2900 acres here involved and to restrain him from having enforced the Order against Edward L. Cline, an individual Indian.

The Tribe likewise petitioned the Federal District Court in the same action "For A Stay Of State Court Proceedings . . ." against individual Omaha Indian Edward L. Cline and others.[62]

On June 5, 1975, the trial court granted the Tribe's request; stayed the proceedings in the Monona County Court; and restrained Jackson and others from interfering with the occupancy by the Omaha Indian Tribe and its members of the 2900 acres constituting the Blackbird Bend Oxbow, as surveyed by Barrett in 1867.[63]

When Petitioner Jackson answered the Tribe's complaint for an injunction against him, he defended on several grounds, among them being that the Blackbird Bend lands, occupied by Edward L. Cline, individual Omaha Indian, and others and the Tribe, had "been totally destroyed by the Missouri River." [64]

On August 26, 1975, Petitioners Wilson and Lakin filed their answer in intervention on behalf of Petitioner Jackson in the cases initiated by the Tribe against him.[65] In that answer, Petitioners Wilson and Lakin admit the allegations made by the Omaha Indian Tribe in its case against Petitioner Jackson that the Omaha Indian Reservation was created in 1854 and that

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[62] Appendix, p. 100, C 75-4026, Omaha v. Jackson, U.S.D.C. N.D., W.D., Iowa.

[63] Appendix, pp. 119-126, pp. 125-126.

[64] Appendix, p. 127.

[65] *Ibid.*, at pp. 131, *et seq.*

". . . in April and May of 1867 [Barrett surveyed] land which could be described [in the Tribe's complaint, which] . . . existed, not in Monona County, Iowa, but within the borders of the state of Nebraska on the right or Nebraska bank of the Missouri River." [66]

Continuing, Petitioners Wilson and Lakin averred against the Omaha Indian Tribe as follows:

"All of said land east of said Iowa-Nebraska Compact Line between the years 1867 and 1943

was eroded away by the action of the Missouri River and ceased to exist at the described location, having been washed down the river."

Additionally, Petitioners Wilson and Lakin declared that new land was created between 1867 and 1943

". . . by the process of accretion to the left or Iowa bank of the Missouri River, which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described [by the Omaha Indian Tribe in its complaint against Petitioner Jackson]. . . ." [67]

In the Brief before the Court, Petitioners reiterate the affirmative defenses interposed against the Omaha Indian Tribe asserting that Blackbird Bend had been completely washed away and completely replaced. That there is no merit to those assertions is evidenced from the review of the facts set forth in the previous parts of this Brief.[68]

The Omaha Indian Tribe, on October 6, 1975, filed its complaint to quiet its title to the entire Blackbird Bend Area, which completely encloses three sides—north-east-south—and includes the 2900 acres surveyed in 1867 by Barrett.[69]

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[66] *Ibid.*, at p. 132.

[67] *Ibid.*, at pp. 132-133.

[68] See, Plates I-V, *supra*; see p. 20, *supra*, *Stability Of The Blackbird Bend Oxbow—A Most Crucial Fact.*

[69] Appendix, pp. 139, *et seq.* See Appendix, Plate C of Complaint, p. 149. The base for the Frontispiece is predicated upon the Barrett Survey and that Frontispiece does not set forth all of the lands claimed by the Omaha Indian Tribe in their Complaint dated October 6, 1975.

Responding by way of Answer and Counterclaim to the Tribe's October 6, 1975 Complaint, as they had responded to the Tribe's May 30, 1975 injunction action against Petitioners Wilson, Lakin and Jackson, the Petitioners pleaded as follows:

1. Petitioners admit the Treaty of 1854 established the Omaha Indian Reservation;
2. Petitioners admit Barrett, in April and May 1867, surveyed the Blackbird Bend Oxbow;
3. Petitioners, nevertheless, affirmatively allege "all of the said [Blackbird Bend Oxbow] land was eroded away by the action of the Missouri River";
4. Petitioners then allege that the lands were completely replaced by accretions to the Iowa bank.[70]

Predicated upon those affirmative defenses, Petitioners, in answering the Tribe's Complaint of October 6, 1975,

"COUNTERCLAIM

"(b) For a judgment quieting title to the lands. . . ."

claimed by Petitioners Wilson and Lakin to have been replaced by accretions where the Blackbird Bend Oxbow had originally been situated.[71]

The Omaha Indian Tribe replied by denying the affirmative allegations and petitioned the denial of the Counterclaim prayed for by Petitioners Wilson, Lakin and Jackson.[72]

Iowa answered the Tribe's October 6, 1975 Complaint, set forth general denials to most of the Tribe's allegations and alleged

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[70] Appendix, pp. 156-158, para. 8.

[71] *Ibid.*, at p. 162.

[72] *Ibid.*, at pp. 178, 181.

> "Defendants own the bed of the Missouri River between the thalweg and the ordinary high water mark. . . ." [73]

The State of Iowa offered no evidence in regard to the ownership of the land referred to in the last quotation. Following that broad assertion, Iowa then claimed title ". . . by additional reason of the quit claim deeds executed" by Raymond G. Peterson, to whom reference has been previously made,[74] and to the deed from Petitioner Lakin to the State of Iowa.[75] Having pleaded its claims to lands, title to which was deraigned from "squatter" Joseph A. Kirk,[76] the State of Iowa prayed for a decree "quieting title" against the Omaha Indian Tribe in regard to the Blackbird Bend Area. It is also worthy of note that the State of Iowa joined Petitioners Wilson, Lakin and Jackson in the latter's contention that the Blackbird Bend lands,

> ". . . which may at one time have been within the geographical area of the Omaha Indian Reservation or in the past occupied by the Omaha Indians, which is now owned by the State of Iowa, was eroded, washed away and ceased to exist by action of the Missouri River, and the rights of the Plaintiff to said land was extinguished thereby." [77]

Thus it is that Petitioners Wilson, Lakin, Jackson and the State of Iowa asserted the same affirmative defenses and were, of course, obligated to assume the burden of proving those affirmative defenses in support of their

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[73] *Ibid.*, at p. 153.

[74] *Ibid.*, at pp. 258-262.

[75] *Ibid.*, at pp. 262-265. NOTE: The State of Iowa claimed additional lands, which are outside of the Blackbird Bend Area.

[76] See pp. 30, *et seq.*, particularly, p. 33, *supra*.

[77] Appendix, p 154.

counterclaims asking for a decree quieting title against the Omaha Indian Tribe.

Petitioner Sorenson pleaded a general denial, together with assertions of the affirmative defenses of statute of limitations, estoppel and laches.[78]

The United States filed its Complaint to quiet title to some of the Blackbird Bend Oxbow lands and for injunctive relief against some of the Defendants, against whom the Omaha Indian Tribe proceeded in its case, Civil No. C 75-4024.[79]

Petitioners Wilson, Lakin, Jackson and Iowa asserted essentially the same defenses against the United States as they did in the Tribe's case.[80] They likewise counterclaimed against the United States praying for a quiet title decree against both the United States and the Omaha Indian Tribe.[81] To the counterclaims filed by Petitioners, the United States replied denying those allegations.[82]

Iowa answered the Complaint of the United States in substantially the same manner that it answered the Complaint of the Omaha Indian Tribe. Iowa likewise counterclaimed against the United States petitioning the court for a decree "quieting title to the lands" conveyed to the State by Petitioner Lakin [83] and by the aforesaid Raymond G. Peterson.[84]

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[78] Appendix, p. 184; see also the denial of those affirmative defenses asserted by Petitioner Sorenson by the trial court's "Motion for Summary Judgment," Appendix, pp. 187-188; see note 49, p. 26, *supra*.

[79] Appendix, pp. 61, *et seq.*

[80] *Ibid.*, at pp. 73, *et seq.*

[81] *Ibid.*

[82] *Ibid.*, at pp. 94, 99.

[83] *Ibid.*, at p. 258.

[84] *Ibid.*, at p. 259. NOTE: The State of Iowa claimed additional lands, which are not part of this litigation.

It is on the background of the complaints of the Omaha Indian Tribe, all as reviewed above, and the answers to those complaints that the case went to trial on the merits. Failure of the Petitioners to sustain the burden of proving their affirmative defenses, either under the laws of the United States or the laws of the States, is manifested beyond doubt. A most comprehensive review of the entire record disclosed that the crucial findings made by the trial court were predicated upon opinion evidence unrelated to any facts and thus were speculative and conjectural, all as will be reviewed.

SUMMARY OF ARGUMENT

Admittedly, the Omaha Tribe and the United States originally held full title to the Omaha Indian Reservation. Part of that Reservation was an area known as the Blackbird Bend Oxbow. That Oxbow, around which flowed the Missouri River, was in existence when the United States and the Omaha Indian Tribe entered into the "Treaty with the Omahas, 1854." It is beyond dispute, moreover, that in April and May, 1867, T. H. Barrett, Surveyor for the United States, meandered the high water mark of the Missouri River in its course around the Blackbird Bend Oxbow. Similarly, it is beyond dispute that there were encompassed within the Barrett meander line 2900 acres of land. Further, there is no question that a substantial portion of the Blackbird Bend Oxbow was divided into 80-acre allotments and that those allotments were occupied thereafter by Omaha Indians for a great many years.

The United States and the Omaha Indian Tribe are now in peaceful possession and occupancy of the 2900 acres, pursuant to the preliminary injunction entered by the trial court on June 5, 1975 (Appendix, pp. 119, *et seq.*).

I

Both the Omaha Indian Tribe and the United States filed actions to quiet the title to the 2900 acres against the adverse claims asserted by Petitioners. Petitioners, responding to the complaints of the Tribe and the United States, asserted affirmative defenses and, by counterclaims, petitioned the trial court to enter a decree quieting the title of Petitioners against the claims of both the Tribe and the United States.

It was pleaded by Petitioners that, although the 2900 acres were meandered by Barrett in 1867, those 2900 acres no longer exist. It is the position of the Petitioners that the 2900 acres, which were originally part of the Omaha Indian Reservation, were totally obliterated by action of the Missouri River. Moreover, it is contended by Petitioners that the 2900 acres, which were allegedly obliterated, were completely replaced "under the sky," to use the term of the Petitioners, by accretions to the Iowa bank of the Missouri River.

Issue was joined in the trial on the merits predicated upon the contentions of the parties, as set forth above.

II

The Omaha Indian Tribe proved its *prima facie* case by offering evidence that (1) the 2900 acres, title to which is the subject matter of the case, were identically the same lands that were surveyed by Barrett in 1867; (2) the 2900 acres had not been obliterated and washed down the Missouri River, as contended by Petitioners; and (3) there were no accretions to the riparian lands in the State of Iowa to replace the 2900 acres surveyed by Barrett, assuming solely for argument that the 2900 acres had been washed down the stream, as contended by Petitioners—facts which, most assuredly, Petitioners did not and could not prove. The Court of Appeals, fully supporting the position of the Omaha Indian Tribe,

predicated upon its *prima facie* case, succinctly stated the consequences flowing from the proof entered into the record by the Tribe:

> "It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines." (App., p. A21; 575 F.2d 631)

The Court of Appeals fully recognized that Petitioners had not proved that the Blackbird Bend lands had been obliterated and washed away, as Petitioners contend. The Court of Appeals likewise declared that the Tribe had overcome any presumption of accretions attaching to the Iowa bank by the proof offered into the record by the Tribe. Relative to the Tribe's proof that there were no accretions to the Iowa bank, the Court of Appeals made this most crucial declaration:

> "The existence of a presumption of accretion, however, does not affect the outcome here. . . . The Tribe having presented substantial conflicting evidence on the issue of accretion, any presumption of accretion disappeared and had no further effect on their case." (App., p. A24, note 22; 575 F.2d 633)

Additionally, the Tribe proved that the Blackbird Bend Oxbow had historic stability dating back, at least, to the Lewis and Clark Expedition and that the lands are still in existence, now being occupied by both the United States and the Tribe.

III

Petitioners' failure to sustain the burden of proof that they assumed when they pleaded affirmatively that the Blackbird Bend Oxbow had been washed away and replaced by accretions is clearly demonstrated by an analysis of the record. For example, contrary to the claim by Petitioners Wilson and Lakin that they deraign title to

patents from the United States, it is undisputed that Petitioners, including Iowa, trace their titles to "squatter" Joseph A. Kirk. Confronted with the absence of good title, Petitioners, pursuant to their pleadings, undertook at great length to prove their affirmative defenses in regard to the alleged destruction and the replacement of the Blackbird Bend Oxbow.

Petitioners relied exclusively upon unsubstantiated opinions in support of their claims. There were no facts which would sustain their position. Nevertheless, the trial court adopted verbatim and uncritically the crucial findings prepared by Petitioners. The trial court concluded that Blackbird Bend was not only washed away but that it was replaced entirely by accretions from the Iowa banks. Predicated upon Petitioners' findings, the trial court entered a decree in favor of Petitioners quieting title to the 2900 acres in Petitioners against the claims of the Omaha Tribe.

IV

Throughout the trial on the merits, repeated objections were interposed by the Omaha Indian Tribe to the opinions offered into the record by Petitioners. It was pointed out to the trial court that there was no evidence in the record that would support the opinions being offered by the expert witnesses who were testifying on behalf of the Petitioners. The trial court had accepted those opinions as being evidentiary in character.

The Court of Appeals rejected the evidence, which was admitted into the record:

> "The basic finding essential to the defendant's case is the trial court's statement that 'the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time

> new land was added to the Iowa riparian land . . . by the gradual process of deposition within the Blackbird Bend area. . . .' " (App., p. A39; 575 F.2d 639)

Relative to that "basic finding essential to the defendant's [Petitioners'] case," the Court of Appeals rendered this specific opinion:

> "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence." (App., pp. A39-A40; 575 F.2d 639)

In declaring the crucial findings of the trial court to be "clearly erroneous," the Court of Appeals reviewed in depth and in detail the evidence that was offered into the record by Petitioners. It referred to the "educated guesses" offered by a principal expert witness of Petitioners. (App., p. A59; 575 F.2d 648) In rejecting the expert's statement, whose testimony constituted "educated guesses," the Court of Appeals declared that "the ultimate conclusion may not rest on mere guesswork." (App., p. A63; 575 F.2d 650). Further, in regard to the trial court's "clearly erroneous" findings, the Court of Appeals rejected specifically the evidence that was offered as being "entirely speculative" (App., p. A44; 575 F.2d 641); "insubstantial" (App., p. A45; 575 F.2d 642). Other evidence was declared to be "highly conjectural." (App., p. A46; 575 F.2d 642).

In continuing its review of the trial court's findings, the Court of Appeals alluded to the conclusions of the trial court in regard to the movement of the Missouri River as shown by the map of 1890. Based upon the statements offered there by the trial court, the Court of Appeals stated that "There exists no factual predicate . . ." for the conclusion expressed by the trial court. (App., p. A56; 575 F.2d 643) Relative to Petitioners' evidence on the River movements during 1912 to 1923,

the Court of Appeals stated that ". . . the evidence [was] too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194." (App., p. A62; 575 F.2d 649)

V

The Court of Appeals was imminently correct in declaring that Federal law governed under the circumstances of the cases here for review. It is too clear for question that the determinative issue was "whether" title to the Blackbird Bend Oxbow had passed from the Tribe; "whether" the Federal law would control in regard to a dispute over an interstate boundary and in regard to the "good" title of the Tribe; and "whether" Congress, in its plenary and exclusive power over Indian affairs, had the authority to enact 25 U.S.C. 194, which placed the burden upon Petitioners.

Congress, in the exercise of its plenary power over Indian affairs, has adopted a protectionist policy with the object of retaining title in the Indians to their lands. In furtherance of that policy, Congress enacted 25 U.S.C. 194, as part of its broad plan to protect Indians against divestiture of title to their property. That statute provides that "In all trials about the right of property . . ." where an Indian has established a presumption of title or possession, the burden of proof will be on the "white person." The original case, which brought this matter to the Court, was "white person" Petitioner Jackson against Omaha "Indian" Edward L. Cline. Petitioners "white persons" Wilson and Lakin joined "white person" Jackson when the Tribe initiated a suit to stay the Order obtained in the State court by Jackson against Cline. Not only is the inceptive case squarely within the explicit language of the statute, but the Congressional intent, manifested by that Act, is clear beyond doubt. The Indians, where they can establish a presumption of title—

as they most assuredly did in these cases—the burden of proof moves to Petitioners. It is, moreover an established precept of statutory interpretation involving Indians that the statutes will be construed in favor of the Indians, if there is a doubt as to the explicit meaning of the statute.

Under those circumstances, it is manifest that the Court of Appeals was correct in its interpretation of 25 U.S.C. 194 and the application of it to Petitioners.

VI

Iowa's anomalous position is predicated upon the circumstances which prevailed in these cases. Iowa did not —and neither did the Petitioners—deraign title from patents. Iowa, like the other Petitioners, traced its title to the "squatter" Joseph A. Kirk. During the trial, Iowa offered no proof of title to the bed of the Missouri River. It did not invoke its sovereignty throughout the trial on the merits in regard to the ownership of the bed of that River or islands arising from the bed of the Missouri River. Rather, it relied exclusively upon quit claim deeds from Petitioner Lakin and other parties not before the Court. It did not claim that the title residing in it stemmed from its admission into the Union on an "equal footing" basis. Iowa simply accepted the evidence offered by Petitioners and the evidence offered by them failed. Thus it is that Iowa's case failed with the other Petitioners. None of the Petitioners, including Iowa, could have his title rise above the dignity of that of "squatter" Kirk.

The Court's Rule 40 precludes Iowa from raising here for the first time its claim to the bed of the Missouri River and the islands in the bed of that River.

Petitioner Iowa, moreover, joins the other Petitioners in seeking to have sustained the trial court's erroneous opinion that Nebraska law should be applied irrespective

of the fact that, throughout its Brief, Iowa urges the application of Iowa law without referring to the fact that the laws of Nebraska were applied throughout the case by the trial court.

The opinion of the Court of Appeals should be affirmed.

ARGUMENT

TRIAL ON THE MERITS

A. Tribe's Prima Facie Case

Admittedly, the Omaha Indian Tribe, Plaintiff and Respondent here, proved beyond question its *prima facie* case.[85] Relative to the fact that the Tribe, as a movant

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[85] The Omaha Indian Tribe proved and there is general agreement that:

a. The United States of America and the Omaha Indian Tribe entered into the "Treaty with the Omahas, 1854." (See, pp. 5-6, note 2, *supra*.)

b. The Blackbird Bend Oxbow was part of the Omaha Indian Reservation at the time the Treaty of 1854 was entered into, pursuant to which the Omaha Indian Reservation was created.

c. Barrett, in 1867, when surveying the entire Omaha Indian Reservation, meandered the high water line of the Missouri River in its course around the Blackbird Bend Oxbow. (See, Plate I, p. 10, *supra*; see also, pp. 8, *et seq.*, *supra*, *Resumé Of The History Of The Blackbird Bend Oxbow*.)

d. There are 2900 acres within the Blackbird Bend Oxbow surveyed by Barrett and the line which he meandered encompassed those lands. (*Ibid.*)

e. Barrett divided lands into 80-acre allotments for occupancy by individual Omaha Indians. (See, p. 11, *supra*, *Barrett's 1867 Allotment Survey*.)

f. The Missouri River moved eastward in its course around the Blackbird Bend Oxbow until 1875 and, in that year, the Missouri River reached its furthest eastern migration at a natural monument known as the Easterly High Bank.

g. Between 1875 and 1879, the Missouri River drastically changed its course. (See, p. 11, *supra*, *The 1879 Survey Of The Blackbird Bend Oxbow*; See Plate II, p. 13, *supra*.)

h. In 1884 and 1900, there was assigned to individual Indians allotments surveyed by Barrett in 1867. Those allotments were

in these proceedings, has sustained its initial burden, the Court of Appeals expressed this view:

> "It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines." [86]

Summarizing the status of the proceedings, after the Tribe's proof of its *prima facie* case had been entered into the record, the Court of Appeals added:

> "Title to the Blackbird Bend area as depicted by the Barrett Survey was presumptively shown to be in the Tribe and therefore, notwithstanding the subsequent movement of the thalweg of the Missouri

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occupied for a great meany years by the individual Omaha Indian allottees. (See, p. 15, *supra, 1884 Allotments Assigned To Omaha Indian Members And Their Occupancy Of The Blackbird Bend Oxbow.*)

i. The Omaha Indian Tribe, further evidencing the continuity of the Blackbird Bend Oxbow, introduced in evidence the map prepared by the Missouri River Commission in 1890. That map located the Blackbird Bend Oxbow and it likewise established the center of the navigable channel around the Blackbird Bend Area at that time. (See, p. 16, *supra, Blackbird Bend Oxbow From 1890 To 1923.*)

j. Proof was likewise introduced by the Omaha Indian Tribe that the Missouri River, prior to 1890, moved progressively north and eastwardly from the Barrett Line to the Northerly High Bank. A large area of land, which had accreted to the Blackbird Bend Oxbow, extended from the Barrett Survey Line to the Northerly High Bank, the point of the furthest progression north and eastwardly by the Missouri River between the years 1890 and 1912. Petitioners introduced extensive evidence locating the Northrly High Bank as mapped by the Monona County in 1912. (Plate III is a copy of the map prepared by the Missouri River Commission locating the River in 1890 and disclosing the areas of accretions to the north and east from the Barrett Survey Line.) The extent of the accretion to the Barrett Line, due to river progression to the aforementioned Northerly High Bank, is part of the historic continuity of the Blackbird Bend Oxbow. (See, p. 16, *supra, Blackbird Bend Oxbow From 1890 To 1923*; Plate III.)

[86] See, App., p. A21; 575 F.2d 631.

> River, the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question." [87]

Having completed its proof of its *prima facie* case, the Omaha Indian Tribe was confronted with the contentions by the Defendants-Petitioners that the Blackbird Bend Oxbow had been totally obliterated by actions of the Missouri River and completely restored by accretions to the Iowa riparian bank of the Missouri River.[88] As will be subsequently reviewed, the Defendants-Petitioners had assumed, under the Iowa law, the burden of proving their affirmative defenses.[89] Otherwise stated, the contention that the Tribe had lost title to the 2900 acres encompassed within the Barrett Survey Line because those 2900 acres had been washed away and totally replaced does not come within the purview of the normal, general denial; hence, there resided with the Defendants-Petitioners, since the time when issue was joined among the parties, that they were required to prove the destruction of the Oxbow and the replacement of it.

Comporting fully with the burden of proof assumed by the Defendants-Petitioners in their answers to the complaints is 25 U.S.C. 194.[90] In specific terms, the Court of Appeals declared the applicability of 25 U.S.C. 194 to these cases on the grounds that it was part of the Federal law adopted by the Congress of the United States to

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[87] See, App., p. A25; 575 F.2d 633.

[88] See, pp. 27, *et seq., supra.*

[89] See, p. 50 *infra.*

[90] "§ 194. Trial of right of property; burden of proof

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

protect the rights and interests of the Tribes. On the subject, the Court of Appeals cited an abundance of unvarying authority to sustain the proposition that the Federal law would be controlling, as distinguished from the State law. (P. 61, *supra*, "The Laws Of The United States Govern . . .")

On the subject of the undisputed facts that the lands in question were part of the Omaha Indian Reservation, established pursuant to the Treaty of 1854, the Court of Appeals, relative to 25 U.S.C. 194, said this:

> "This historical fact shows 'previous possession or ownership' and is sufficient to raise a presumption of title in the Tribe under the statute and to place the burden of proof on the defendants." [91]

On the background of that burden of proof, reference will now be made to the record in the case as established by the Omaha Indian Tribe.

1. *Proof By The Tribe That The Blackbird Bend Oxbow Was Not Obliterated, As Contended By Defendants-Petitioners*

There has been reviewed in detail this overriding fact: The Blackbird Bend Oxbow was never obliterated and was never washed down the Missouri River, as pleaded by Defendants-Petitioners, which they unsuccessfully undertook to prove.[92]

2. *Rebuttal Of Presumption Of Accretion By The Tribe*

Irrespective of applicability of Federal law to these cases and whether there prevailed in these cases a presumption of accretions, as recognized by the laws of Iowa,

[91] See, App., pp. A21-A22; 575 F.2d 631.

[92] See, pp. 8, *et seq., supra, Resumé Of The Blackbird Bend Oxbow.* See, Plate I, p. 10; Plate II, p. 13; Plate III, p. 17; Plate IV, p. 21; Plate V, p. 22, *supra.*

the Tribe proved that: There were no accretions to either the Easterly or the Northerly High Banks.[93]

[93] In addition to the proof of its *prima facie* case, the Omaha Indian Tribe proved the following:

a. The Missouri River, in the years 1875-1879, abruptly and suddenly abandoned its deeply incised, clearly defined bed of the stream, which today is an abandoned stream bed at the toe of the Easterly High Bank:

(1) There were no accretions to the Easterly High Bank. (See, p. 11, *supra.*)

In error, Petitioners, in their Brief at p. 16, make this statement, which is wholly without foundation: "In 1894 the area under the sky formerly occupied by the east end of the Barrett survey peninsula was surveyed as accretion land by the county surveyor . . . and apportioned to the Iowa riparian owners accordingly. (W. Ex. X3, R. 1779, 1784)." The alleged accretion survey was not from the riparian lands. Rather, that survey is most unusual. It commences at the totally obliterated 1852 Anderson Line, which no longer existed at the time of the alleged accretion survey. See, in that connection, the cited exhibit. The Petitioners' witness admitted that the Anderson survey line was no longer extant, thus depriving the alleged accretion survey of any merit. The survey was not and could not have been to the riparian bank, which was far to the east. It was not, as Petitioners say, "apportioned to the riparian owners." There were no riparian owners at the Anderson survey line. See, transcript, p. 1781. A most liberal trial judge, viewing the exhibit, upon which Petitioners rely, admitted it was being "marginal." Transcript, p. 1784.

(2) The Missouri River, in keeping with the prediction of Barrett in 1867, during the years 1875-1879, suddenly and abruptly left the Easterly High Bank, permanently severing from the Blackbird Bend Oxbow a portion of it, leaving that land east of the Missouri River and situated in the State of Iowa. (See, *The 1879 Survey Of The Blackbird Bend Oxbow*, particularly at p. 11, *et seq., supra.*)

(3) There were no accretions to the Northerly High Bank, the furthest point of migration of the Missouri River, which occurred in 1912. From that Northerly High Bank, the Missouri River suddenly and abruptly abandoned its 1912 channel and left, at the toe of the Northerly High Bank, a deeply incised, clearly defined abandoned bed of

The comprehensive, factual material introduced into the record by the Omaha Indian Tribe to rebut the presumption of accretion was explicit and in detail. Among other things, the Tribe proved the difference between channel fill, of which the abandoned bed of the Missouri River at the toe of the Easterly and Northerly High Banks is composed, and the material, of which accretions are comprised.[94]

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the stream, which is easily located today. (See, *Blackbird Bend Oxbow From 1890 To 1923*, pp. 16, *et seq.*, *supra*.

(4) Prior to 1923, the Missouri River abandoned its 1912 stream bed and moved sharply to the west of the Blackbird Bend Oxbow, leaving the land surveyed by Barrett in 1867 east of the Missouri River in the State of Iowa. (*Ibid.*, at p. 16, *supra*. See Plate IV, p. 21, *supra*.) It will be observed that the Missouri River was west of the Blackbird Bend Oxbow lands and that a very large portion of the Blackbird Bend Oxbow lands were in place. They had not been and have never been destroyed by river action or any other action, as contended for by Petitioners. (See, *Blackbird Bend Oxbow From 1890 To 1923*, p. 16, *supra*. See Plate IV, locating the 1923 River, all as surveyed by the United States Corps of Engineers.)

[94] See, below, and references. There was general acceptance of the Tribe's proof, which distinguished accretions, allegedly attached to the Easterly and Northerly High Banks, from channel deposits, which were found at the toe of those banks. (For description of the Easterly High Bank, see, pp. 11-12, note 13, *supra*; for description of the Northerly High Bank, see, p. 18, note 29, *supra*.)

Definitions of Crucial Geologic and Topographical Features:

Dr. Robinson obtained samples (Tribe's Exhibits 89, 90, 91) on the representative geologic and soil deposits involved in these cases, the definitions of which are generally accepted by all parties.

a. *Channel Fill Deposits* are found in the abandoned bed of the Missouri River. They consist principally of silts and clay. They are fine deposits which have been found by Dr. Robinson, Dr. McQuivey and Dr. Hallberg in the abandoned channels at the foot of the described Easterly and Northerly High Banks. (Robinson, Vol. 6, p. 822, lns. 20-24; McQuivey, Vol. 12, p. 1615, lns. 1-3; Hallberg, Vol. 19, p. 2824, lns. 5-23.)

b. *Point Bar Deposits* are primarily fine to medium sands. The Blackbird Bend meander lobe consisting of 2900 acres is

By proving that accretions did not attach to either the Easterly or Northerly High Banks, there was defeated the second facet of Petitioners' affirmative defenses—that the Blackbird Bend Oxbow was replaced by accretions to the Easterly and Northerly High Banks and that those accretions replaced the original 2900 acres "under the sky."

The Court of Appeals, having reviewed the Tribe's evidence proving that accretions did not attach to the Easterly or Northerly High Banks, made this statement:

> "The existence of a presumption of accretion, however, does not affect the outcome here. . . . The Tribe having presented substantial conflicting evidence on the issue of accretion, any presumption of accretion disappeared and had no further effect on their case." [95]

There is an abundance of sound authority in support of the last-quoted principle.[96] Recent commentaries, re-

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principally composed of point bar deposits. (Robinson, Vol. 6, p. 820, lns. 20-21; Hallberg, Vol. 18, p. 2587, lns. 3-9.)

c. *Over Bank Deposits* consist of fine silt and clay. The over bank deposits are those sediments left upon the land by the Missouri River during periods of high water or floods during which the river left its ordinary banks and inundated the surrounding Lands. It was those Nile-Like inundations carrying sediments upon the land that have provided the good top soil found at the surface of the 2900 acres, the title to which is the subject matter of these partially consolidated cases. (Robinson, Vol. 8, p. 821, lns. 18-21.)

d. *Alluvium or Alluvion Deposits*, of which accretions are comprised, are the materials consisting of sand, silt, and gravel which attach to riparian land *due to river action*. They are the deposits of which accretions to riparan lands are comprised when attached to riparian land *by river action*. Basically, they consist of point bar deposits, as described above.

[95] See, App., p. A24, note 22; 575 F.2d 632.

[96] Sperberg v. Goodyear Tire & Rubber Co., 51 F.2d 708 (CA 6, 1975); *cert. den.*, 423 U.S. 713 (1975). As the Court there pointed out, citing Del Veccio v. Bowers, ". . . a statutory presumption 'falls

viewing the new Federal Rules of Evidence, fully support the declaration by the Court of Appeals that the Tribe had overcome any presumption respecting accretions that might have arisen in these cases.[97] It is very clear that Petitioners are not entitled to rely upon any presumption of accretions that might have been available to them. The Tribe defeated the presumption by the evidence which it introduced, all as declared by the Court of Appeals.

B. Failue Of The Defendants-Petitioners To Sustain Their Burden Of Proof Assumed By Pleadings And Pursuant To 25 U.S.C. 194

By its in-depth analysis of the facts in these complex cases, the Court of Appeals was capable of determining the fatal weaknesses of Defendants-Petitioners' unsuccessful attempt to prove (1) the alleged obliteration of the 2900 acres comprising the Blackbird Bend Oxbow; and (2) the alleged replacement "under the sky" of those 2900 acres by a new 2900 acres of accretions to the Iowa bank.

Predicated upon the analysis of Defendants-Petitioners' attempts to prove their affirmative defenses, the Court of Appeals made this most crucial ruling:

> "The basic finding essential to the defendant's case is the trial court's statement that 'the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by

out of a case' when the party against whom the presumption works meets his burden of offering evidence sufficient to justify a contrary finding." 296 U.S. 280, 286 (1935).

[97] 21 *Federal Practice and Procedure, Federal Rules of Evidence*, § 5124, " ' Presumptions' Defined," *et seq.* See also, 63 Virginia Law Review, 285, stating, "The burden of production is the obligation of a party to present sufficient evidence on a disputed issue to permit a fact finder to act upon it." See also, *Federal Rules of Evidence Manual*, Redden & Saltzburg, Rule 301, p. 45.

> the Missouri River . . . and that at the same time new land was added to the Iowa riparian land . . . by the gradual process of deposition within the Blackbird Bend area. . . .' " [98]

Using unequivocal terms, the Court of Appeals rejected that crucial finding by the trial court. By adopting that course, the Appellate Court removed the underpinnings of the trial court's conclusions and Memorandum Opinion, resulting in the reversal of the trial court, which brings these cases here for review. These are the words of the Court of Appeals in its rejection of the above-quoted finding:

> "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence." [99]

Petitioners, although they put in thousands of pages of testimony and innumerable exhibits, failed to sustain the burden of proving the obliteration of the Blackbird Bend Oxbow and the replacement of it by accretion. Their principal witness, Dr. Kennedy—who had visited the land but one day—speaking in regard to Missouri River movement, 1875-1879, and without facts in support, expressed his opinion that the Blackbird Bend Oxbow:

> "Eroded away, and consequently much of the material that we see in 1875 as Barrett bar has been taken away and is now on its way to the Gulf of Mexico." [100]

That erroneous testimony comports with Petitioners' witness' earlier statement that the Blackbird Bend Oxbow had been "obliterated" by the Missouri River.[101]

[98] See, App., p. A39; 575 F.2d 639.

[99] See, App., pp. A39-A40; 575 F.2d 639.

[100] Appendix, p. 250.

[101] *Ibid.*, at p. 246, where Dr. Kennedy states: "I have testified that it is my judgment that this whole convex bar [Blackbird Bend

Magnitude of the erroneous testimony that the Blackbird Bend Oxbow had been "taken away" or "obliterated" is demonstrated by a simple examination of Plate II.[102] There, the Blackbird Bend Oxbow, during a period of very high water, far from being washed away, was mapped with large stands of timber growing on the lands allegedly obliterated or allegedly washed away. It is worthy of note, moreover, that the lands that had been "obliterated" were thereafter occupied for a great many years by individual Indian allottees, who farmed the lands.[103]

It has been demonstrated that the Blackbird Bend Oxbow had not been washed away, as testified to by Petitioners' witness. The issue next to be examined is the contention by Petitioners that, in some manner, the Blackbird Bend Oxbow had been replaced "under the sky" by accretions to the Easterly and Northerly High Banks. Again, Petitioners' witnesses failed to support their opinions. Repeatedly, throughout the trial, the witnesses expressed opinions without a scintilla of evidence in the record to support them.

On the subject of accertions to the Iowa bank, Petitioners' principal witness was unable to locate where the accretions had attached. He testified as follows in regard to the alleged accretions:

> "I cannot say specifically that they were merged [alleged accretions] together here or at this point or at some other point. All I can say is I would *expect* as rivers normally behave for this to be an

Oxbow] had been obliterated during this period of the high flows that occurred in the four years between '75 and '79."

[102] See, p. 13, *supra*.

[103] See, p. 15, *supra*, *1884 Allotments Assigned To Omaha Indian Members And Their Occupancy Of The Blackbird Bend Oxbow.*

> area of deposition, and deposition would occur *preferentially* along the Iowa bank." [104]

The problem with which Petitioners' witness was confronted was the undeniable proof of the Tribe's witnesses that there were no accretions to either bank.[105] For Petitioners to offer evidence would have required a factual predicate that was non-existent and the terms "expect" or "preferentially" fall far short of the requirements for proof of a physical phenomenon such as accretions to a bank.

Another of Petitioners' witnesses, Dr. Hallberg, in an effort to support the contentions that the Blackbird Bend Oxbow had been "obliterated" or washed away found great difficulty in supporting such contentions. In the course of his testimony, that witness, in candor, admitted that his testimony, "—is indeed an educated guess no matter whose opinion or what his opinion is, sir." [106]

Comments in regard to the Court of Appeals' rejection as being "clearly erroneous" of the trial court's "basic finding essential to the defendant's [Petitioners'] case" has disclosed that Petitioners relied upon opinion evi-

[104] Appendix, pp. 255-56 [emphasis added].

[105] See the extensive testimony proving that there were no accretions to either the Easterly or Northerly High Banks. See, description of Easterly High Bank, at pp. 11-12, note 13, *supra*; and description of Northerly High Bank, at p. 18, note 29, *et seq.*, *supra*. The proof that there were no accertions to the Easterly or Northerly High Banks was predicated upon intensive soil and geologic investigations, which demonstrated that the channel-fill deposits were not accretions to the bank and, hence, the abandoned bed of the stream constituted proof that the River had left suddenly and abruptly and had not accreted to the banks antecedent to the departure of the River from the toe of those two banks, the Easterly and Northerly High Banks; see App. p. A49, note 49; 575 F.2d 643, note 49.

[106] Appendix, p. 242. See also Petitioners' "educated guesses," App., p. A49, note 49; 575 F.2d 643.

dence, which was totally unsubstantiated by facts.[107] Additionally, the Court of Appeals was sharply critical of the evidence received into the record by the trial court in regard to every phase and facet of the case. Relative to the trial court's finding that there were accretions in 1890 east of the Missouri River, the Court of Appeals said this:

> "There exists no factual predicate whatsoever to support this conclusion." [108]

The opinion evidence offered by Petitioners relative to the years subsequent to 1890 and down through 1923 was equally defective, as the testimony offered relative to the earlier years. Reference is made to the fact that Petitioners' witnesses had assessed their testimony as being "educated guesses." The Court of Appeals then stated that Petitioners' opinion evidence was "extremely speculative" and insufficient to "sustain" Petitioners' burden of proof.[109]

1. *Clearly Erroneous Findings Prepared By Petitioners And Adopted Verbatim By The Trial Court* [110]

The Court of Appeals, rejecting "The basic finding essential to the defendant's case," stated:

> "In reviewing this finding our task is not made easier by the district court's verbatim adoption of the defendant's analysis of the evidence and proposed findings of fact including the defendants' credibility assessments of the witnesses."[111]

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[107] See, App. p. A39; 575 F.2d 639.

[108] See, App., p. A56; 575 F.2d 646.

[109] *Ibid.*, at p. A59; 575 F.2d 648.

[110] See, Appendix at p. 44—Proposed Findings of Fact, Conclusions of Law, and Decree submitted by Petitioners to the trial court, Judge Bogue presiding.

[111] App., p. A39; 575 F.2d 639.

Petitioners complain in regard to the last-quoted observation by the Court of Appeals,[112] yet the Court of Appeals dealt lightly with the matter.

On the crucial issues respecting the alleged obliteration of the Blackbird Bend Oxbow, Petitioners proposed the following finding to the trial court—Judge Bogue presiding—

> "As the river moved in a gradual progression to the south and west it was eroding against the meander lobe as surveyed by Barrett in 1867 destroying and entirely washing the land surveyed by Barrett down the river (2955:17-2956:19)." [113]

That identical language proposed by Petitioners, was adopted by the trial court without change.[114] Yet, as reviewed immediately above, the Blackbird Bend Oxbow was not destroyed and washed away.[115]

The transcript citations adopted by the trial court pertain to the totally erroneous testimony of Petitioners' witness, which is quoted above.[116] Continuing to copy verbatim—and uncritically—Petitioners' proposed findings, the trial court adopted this most crucial language in regard to accretions to the Iowa bank:

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[112] Pet.'s Br., p. 12.

[113] See, Appendix, p. 44, Petitioners' Proposed Findings. Findings by the Court, 1852-1879, commencing at pp. 19, *et seq.*, and appearing on p. 20.

[114] See, App., at p. B28.

[115] See, p. 54, *supra*.

[116] Appendix at p. 246, declaring that the Blackbird Bend Oxbow had been obliterated or, as otherwise stated by Petitioners' witness: The Blackbird Bend Oxbow had been "Eroded away, and consequently much of the material that we see in 1875 as Barrett bar has been taken away and is now on its way to the Gulf of Mexico."

> "Deposition of silt, sands, and gravels (described by plaintiffs' counsel as 'alluvion') was occurring during this process. This resulted in additions of new land to the left bank which new land was beyond the power of identification. It was in fact accretion to the Iowa riparian landowners . . . (2951:3-2952:15)." [117]

Identical language, prepared by Petitioners, was adopted by the trial court.[118] That there were no accretions to the Iowa bank is too clear for question. Petitioners offered no facts to the contrary. The testimony from Petitioners' witness who, without knowledge on the subject, declared that he would "expect" accretions and that they would "preferentially" attach to the Iowa bank.[119] Those findings were, moreover, predicated upon the "educated guesses" of Petitioners' witnesses.[120]

It is abundantly manifest that the Court of Appeals had no alternative but to declare as it did:

> "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence." [121]

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[117] Appendix, pp. 255-56.

[118] App., at p. B28.

[119] Appendix, pp. 255-56. NOTE: The transcript citations are identical to those adopted by the trial court and there were no facts in the record on the subject.

[120] See, p. 54, *supra*.

[121] See App., pp. A39-A40; 575 F.2d 639-640. On the subject of clearly erroneous "findings," the Court said this:

> "There seem to be nothing more than conjectures . . . No inference of fact or of law is reliable drawn from premises which are uncertain . . . . It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption." (United States v. Ross, 92 U.S. 281, 283 (1894).

That statement is particularly applicable to the trial court's findings in these cases.

[Footnote continued on page 57]

2. *Petitioners' Source Of Title—"Squatter" Kirk—An Element Contributing To The Deficiencies In The Proof Offered By Them In Support Of Their Affirmative Defenses*

Though Petitioners, including the State of Iowa, have asserted good title to the lands, which they claim in these proceedings, it has been demonstrated above that those claims are without merit. As reviewed, Petitioners Wilson, Lakin and Jackson do not deraign their title to patents as they profess in their Briefs.[122] Petitioner Iowa can make no "equal footing" claim here. Iowa and the other Petitioners deraign their titles from "squatter" Joe Kirk.[123]

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[121] [Continued]

Citing United States v. United States Gypsum Co., Moore, in his works, sets forth this statement which, it is believed, is controlling here:

> "A finding is 'clearly erroneous' when although there is evidence to support it [here, there is none], the review court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

5A *Moore's Federal Practice*, § 5203 [1]. See Jackson v. Hartford Accident & Indemnity Co., 422 F.2d 1272, 1278 (CA 8, 1970); *cert. den.*, 400 U.S. 855 (1970); Manufacturing & Equipment Co. v. Commission, 434 F.2d 373, 376 (CA 8, 1970); Robinson v. The Home Indemnity Co., 438 F.2d 1273, 1274 (CA 8, 1971); Union v. Milstream, 474 F.2d 948, 952 (CA 8, 1973); Solomon v. Crown Life Ins. Co., 536 F.2d 1233, 1239 (CA 8, 1976).

There has been reviewed above the admission by the principal witness of the Petitioners that his testimony was an "educated guess." (p. 15, note 23, *supra*; App., p. A59; 575 F.2d 648) Indeed, the evidence, which was offered by Petitioners, relative to the period of 1879 to 1912, did not meet the test of an "educated guess." Findings by the trial court on the Missouri River movements during the critical 1890 period were rejected by the Court of Appeals in these terms: "There exists no factual predicate whatsoever to support this conclusion." (App., p. A56; 575 F.2d 646)

[122] Pet.'s Br., p. 4.

[123] See, pp. 25, *et seq.*, *supra*, *"Sqpatter" Joseph A. Kirk Is Principal Source Of Title For Petitioners Wilson, Lakin, Jackson*

Petitioners' proof, as to all aspects of these cases, has invariably fallen far short of the pleadings that they filed with the trial court or the contentions which they have advanced both here and before the Court of Appeals. That circumstance was particularly manifested in regard to the periods of 1890-1912 and 1912-1923.[124]

3. *Petitioners, Under The Laws Of Iowa, Assumed The Burden Of Proof In These Consolidated Cases, Which They Failed To Sustain*

There has been reviewed above in some detail that the Omaha Indian Tribe proved its *prima facie* case.[125] There has likewise been emphasized the fact that Petitioners, including the State of Iowa, do not deraign their title from patents issued by the United States.[126] Petitioners, bereft of other defenses, pleaded affirmatively that they acquired title by reason of the "obliteration" of the Blackbird Bend Oxbow by the Missouri River and the replacement—"under the sky"—of the lands formerly of which the Oxbow was composed, by accretions to the Easterly and Northerly High Banks.[127] Petitioners coun-

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(Wilson's Lessee)—Not Patents As Asserted; see, p. 28, *supra, Petitioner State of Iowa Traces Its Title To "Squatter" Joseph A. Kirk.*

[124] It will be observed that the trial court not only adopted the precise headings—"E. Missouri River Between 1890 And 1912" and "F. Missouri River Between 1912 And 1923"—it adopted identically the same language and citations, as were offered by Petitioners. Compare Petitioners' findings, pp. 23, *et seq.*, Appendix, p. 44, with trial court's findings, at App., B31 *et seq.*

[125] See, pp. 43, *et seq., supra.*

[126] See, p. 25, *supra, "Squatter" Joseph A. Kirk Is Principal Source Of Title For Petitioners Wilson, Lakin, Jackson (Wilson's Lessee)—Not Patents As Asserted,* particularly p. 28, *supra,* respecting Iowa's source of title. Petitioner Sorenson's title presents a quandry. Apparently, title is asserted to the lands in question in these proceedings predicated upon an Affidavit of Possession.

[127] See, pp. 30, *et seq., supra.*

terclaim for decrees against the Omaha Indian Tribe, quieting title in them.[128]

Petitioners, having pleaded their affirmative defenses and having prayed for a decree quieting title against the Omaha Indian Tribe, had the burden of proof in regard to their claims. Few things are more specifically settled than the obligation of the Petitioners under the laws of Iowa. On the subject, the Supreme Court of Iowa had this to say:

> "The defense upon which Clara Cotter, in the suit to quiet title, bases her claim to the ownership of the property, is an affirmative one, and the burden is upon her to establish it." [129]

Again, the Supreme Court of Iowa, reviewing pleadings and claims similar to those here involved, made this specific ruling:

> ". . . [defendants] in their defenses in the quiet title claim made certain affirmative allegations. They have the burden of sustaining their claims of fraud [and related defenses]. . . ." [130]

Quite recently, the Court of Appeals for the Fifth Circuit said this:

> "Since the Buras heirs have asserted title to the land which is in the possession of the United States, they have the burden of proving their title." [131]

There is universal acceptance of the principles of law, including 25 U.S.C. 194, that Petitioners here had the

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[128] See, pp. 33, *et seq., supra.*

[129] Crawford v. Cotter—Iowa—257 N.W. 354, 356 (1934).

[130] In re: Sterling's Estate, 249 Iowa 1260; 92 N.W.(2d) 134, 138 (1958).

[131] United States of America v. Buras, 458 F.2d 346, 349-50 (CA 5, 1972), *cert. den.,* 414 U.S. 865 (1973).

obligation of proving the Blackbird Bend Oxbow had been destroyed by the action of the Missouri River and replaced by accretions to the Iowa bank.[132] That they failed in that burden is the main thrust of the opinion of the Court of Appeals which is before the Court.

C. The Laws Of The United States Govern Where, As Here, The Issue Is "Whether" Title To The Blackbird Bend Oxbow Passed Out Of The Omaha Indian Tribe And The United States

There is a single, paramount issue which determines the law—Federal or State—to be applied: Did title to the 2900 acres of land—originally held by the Omaha

[132] Swim v. Langland, 234 Iowa 46, 11 N.W.2d 713, 715 (1943); Frost v. Markham, 86 N.W. 261; 526 P.2d 808 (1974); York v. James, 62 Wyo. 184; 165 P.2d 109 (1946); Baxter v. Vasquez, 501 S.W.2d 201, 206 (1973). "Where each party to a quiet title action is claiming title against the other, the burden of proof is upon the respective parties to prove better title than the others . . . . And the burden of proving the existence of all the elements of adverse possession is upon the party claiming title by adverse possession." See, Wilcox v. Pinney, 250 Iowa 1378, 98 N.W.2d 722 (1959), there the court stated: "Thus defendant-counterclaimant's burden was a heavy one. They must not only show the land plaintiff claims was entirely destroyed, but that the restored land was rightly theirs." See, in this connection, IX *Wigmore on Evidence, Burden of Proof,* § 2485; see also 1A *Federal Rules of Civil Procedure,* 0.314(2); see also Rule 8(c), *Federal Rules of Civil Procedure* (c) *Affirmative Defenses.* "In pleading to a preceding pleading, a party shall set forth: estoppel, . . . laches and any other matter constituting an avoidance of affirmative defense." Iowa's Rules of Court are of interest in this connection. There it is declared: "No variance between pleading and proof shall be deemed material unless it is shown to have misled the opposite party to his prejudice in maintaining his cause of action or defense. *But where an allegation or defense is unproved in its general meaning, this shall not be held a mere variance but a failure of proof.*" [Emphasis supplied] See, Iowa Rules of Court, 1978, Rule 106. For a general statement, predicated upon substantial authority, see 65 Am. Jur. 2d, p. 209 § 79, "Where defendant, in an action to quiet title, substantially asserts and relies upon a fact as an affirmative issue, he must establish such fact." See also, 65 Am. Jr., *Quieting Title,* "Defendant's Burden of Proof."

Indian Tribe, pursuant to its 1854 Treaty, surveyed by Barrett in 1867, occupied many years thereafter by members of the Omaha Indian Tribe and now presently occupied by the United States and the Tribe—pass out of the Omaha Indian Tribe and the United States? The inquiry thus presented is inextricably related to the boundary issue.[133]

As to the applicability of Federal law to claims presented here by the Omaha Indian Tribe, the Court of Appeals, among other things, said this:

> "The present dispute is not related to incidents or rights flowing from a conveyance of public land or related to a patent grant of Indian allotment lands. [Rather, stated the Appellate Court] . . . the direct challenge made by the Iowa landowners here affects the boundary line to the reservation land itself, as it was originally contained in the Barrett Survey and established by the Treaty of 1854." [134]

Continuing in regard to the applicability of Federal law in light of the threats by Petitioners to the Omaha Indian Tribe, the Appellate Court added:

> "The claims asserted by the defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands." [135]

To the aggresive claims of Petitioners against the Omaha Indian Tribe, the Court of Appeals said this:

> "Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under federal law. Presumptively, at least, this right has never been extinguished." [136]

[133] App., p. A20; 575 F.2d 631.

[134] See, App., p. A17; 575 F.2d 629.

[135] *Ibid.*

[136] *Ibid.*

In applying Federal—not State—law to that factual statement, the Court of Appeals adhered to an unvarying line of decisions, as enunciated by the Court throughout this Nation's history. Among the numerous cases cited by the court below was the relatively recent *Oneida* decision, in which the Court said:

> "In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law."

Continuing, the Court made this statement which, it is respectfully submitted, governs here:

> ". . . it rests on the not insubstantial claim that federal law protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession." [137]

There is, of course, an imperative need for the National Government to apply its own laws rather than to apply the laws of the States to determine whether title has passed from the Tribe and the United States. The Court succinctly stated the reasons why State law must not control under the circumstances here before the Court:

> "A different rule would place the public domain of the United States completely at the mercy of state legislation." [138]

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[137] App., pp. A17-A18; 575 F.2d 629. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974).

[138] Camfield v. United States, 167 U.S. 518, 525 (1897).

Justice Marshall, in the formative years of this Nation, explained the reasons why the United States, respecting authority specifically delegated to it, should not look to State law or State determinations:

> "No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone it was expected to rely for the accomplishment of its ends." (McCullough v. Maryland, 17 U.S. 315, 424 [1819])

The same concept, declaring the exclusive power of the United States to determine when title passes from the United States, has been expressly applied to circumstances here involved where the issue was whether the title of the Indians had passed out of their ownership. See, United States v. Santa Fe Pacific RR. Co., 314 U.S. 339, 345 (1941); see also p. 347. There it is declared, respecting title to Indian lands, that the "power of congress . . . is supreme." See, Light v. United States, 220 U.S. 523 (1911).

From a very early date in this Country's history, predicated upon the concepts reviewed above, the Court said this:

> "We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States. . . ." [139]

The Court of Appeals, quoting from *Corvallis*, likewise —based upon an abundance of authority—declared that,

> "If [as here] a navigable stream is an interstate boundary, this Court . . . has necessarily developed a body of federal common law to determine the effect of a change in the bed of the boundary." [140]

There are no authorities that have been found or which have been cited by Petitioners which would point to error

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[139] State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 377 (1977).

[140] App., p. A13; 575 F.2d 628. Taking cognizance of the 1943 Boundary Compact between Iowa and Nebraska, the Court of Appeals referred to the fact that the title issue here involved arose antecedent to the 1943 Compact. That Compact provided that title would not be affected by the change in the boundary. The Appellate Court declared that ". . . in this case, since issue concerns who held good title to the land in question prior to 1943, federal law must be applied." App., p. A15; 575 F.2d 628.

by the Court of Appeals in applying Federal law to these consolidated cases now before the Court.

1. *25 U.S.C. 194—An Appropriate Exercise Of Authority By The Congress Of The United States And Correctly Interpreted By The Court Of Appeals* [141]

The Court of Appeals stated:

> "It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines." [142]

Title, previous possession and present occupancy and possession of the 2900 acres—all within the purview of 25 U.S.C. 194—were proved by the Tribe and agreed to by Petitioners.[143] Predicated upon that ownership and possession, the Court of Appeals stated that the Tribe's proof sufficed ". . . to raise a presumption of title in the Tribe under the statute and to place the burden of proof on the defendants." [144] As will be reviewed, the complaints of Petitioners, respecting 25 U.S.C. 194 and the application of it to them, are basically academic by reason of their own conduct in these proceedings—their efforts, for example, to sustain their burden of proof and their failure in that regard.

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[141] 25 U.S.C. 194: "§ 194. Trial of right of property; burden of proof

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

[142] See, App., p. A21; 575 F.2d 631.

[143] *Ibid.* See, pp. 43, *et seq.*, *supra.*

[144] App., p. A22; 575 F.2d 631.

2. *Petitioners Complain About Their Burden Of Proof They Perforce Assumed By Their Pleadings*

Petitioners, under the force of circumstances, pleaded the affirmative defenses, which have been reviewed in detail.[145]

Bereft of other defenses, Petitioners claimed title in themselves by reason of the obliteration of the Blackbird Bend Oxbow and the replacement of it. In support of their affirmative defenses, Petitioners offered thousands of pages of oral testimony, innumerable pages of documentary evidence and numerous demonstrative exhibits. Comprehensive findings were prepared by Petitioners for the trial court.[146] Those findings—albeit, clearly in error—demonstrate conclusively the extent to which the Defendants offered evidence in support of their affirmative defenses.[147]

As emphasized above, the Court of Appeals, in the exercise of its power, authority and jurisdiction, after carefully scrutinizing the record, declared that the critical findings proposed by Petitioners and adopted verbatim by the trial court were "clearly erroneous." [148]

3. *Petitioners Do Not Assert That 25 U.S.C. 194 Placed A Heavier Burden Upon Them They Voluntarily Assumed*

Extensive argument is presented by Petitioners in support of their contention that the Court of Appeals erred in placing the burden of proof upon them in accordance with 25 U.S.C. 194.[149] They cannot, nevertheless, deny

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[145] See, pp. 30, *et seq.*, *supra.*

[146] See, pp. 54, *et seq.*, *supra.*

[147] See, App., pp. B1-B61.

[148] See, pp. 54, *et seq.*, *supra.*

[149] See, Pet.'s Br., pp. 26-42.

that the burden placed upon them was only commensurate with and no greater than the burden of proof that they assumed when they pleaded the affirmative defenses against the Tribe and petitioned for a quiet title decree predicated upon those defenses.

Under the circumstances, it is impossible to perceive the merit in Petitioners' complaint against the ruling of the Court of Appeals. Petitioners voluntarily assumed the burden of proof placed upon them by 25 U.S.C. 194. They failed to sustain that burden.[150]

4. *Petitioners Come Squarely Within The Provisions of 25 U.S.C. 194*

The language of 25 U.S.C. 194 is explicit and its objectives are manifest. The Court of Appeals declared 25 U.S.C. 194 "clearly evidences a protectionist policy with regard to Indians." [151] The trial court—Judge McManus presiding—expressed the same broad principles in these terms:

> ". . . public interest in this case must favor the protection of Indian possessory rights to lands set aside in trust for them pursuant to a treaty." [152]

Petitioners [153] seek to avoid the historic congressional policy of protecting the Indians in their rights to their lands. They would have the Court restrict 25 U.S.C. 194 to an "individual Indian" against an "individual white person." That interpretation would render the Act a nullity. It would preclude the United States, Trustee, from appearing on behalf of an "Indian" within the purview of 25 U.S.C. 194. Petitioners would also

[150] See, pp. 58, *et seq.*, *supra*.

[151] See, App., p. A22; 575 F.2d 632.

[152] Appendix, pp. 119, 123.

[153] Pet.'s Br., pp. 26, *et seq.*

preclude a Tribe from acting on behalf of its members. Equally clear—if the interpretation of 25 U.S.C. 194, as asserted by Petitioners, is accepted—an "Indian" would be precluded from invoking 25 U.S.C. 194 when participating in multiple-party/multiple-issue litigation of the charter here involved; the type normally attendant upon major litigation.

Petitioners' interpretation involves a clear violation of the trust obligation. It would, for instance, have prevented the United States from entering cases of the character initiated in the State court by "white person" Jackson to enjoin individual Omaha "Indian" Cline from occupying the Barrett survey lands. Following the initiation of that case, the United States and the Tribe acted on behalf of Defendant Cline.[154] The Federal court restrained the enforcement of the State court's order obtained by "white person" Jackson against "individual Indian" Cline.[155] That stay was contained in the Order of June 5, 1975, Judge McManus presiding.[156]

Efforts by Petitioners to violate the congressional will to assist the Indians press their points beyond the realm of reason.[157]

[154] See, p. 30, *supra*.

[155] See, Appendix, p. 117.

[156] Appendix, p. 119, at p. 125.

[157] Pet.'s Br., p. 30. Petitioners assert R.G.P., Inc., and the Travelers Insurance Company are not "white persons"—Petitioners might have added but did not that neither of the Corporations are before the Court. Hence, the matter is moot. Petitioners set forth in their Brief this cryptic statement: "White persons have to be flesh and blood—human beings. The individual Petitioners could be white persons." Admittedly, counsel for the Omahas did not ask Petitioners Lakin and Jackson (Wilson did not appear) whether they were white persons. Consequences of interrogation of Petitioners, as to their race, would scarcely have aided application of the spirit and intentment of 25 U.S.C. 194. If these Petitioners are *not* "white persons," it behooves counsel for the Petitioners to so advise the Court.

Unquestionably, the inceptive action—Jackson, a "white person," against Cline, an Omaha "Indian"—comes squarely within the letter of the language of 25 U.S.C. 194, which states:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other [the latter shall have the burden of proof, as provided by the statute]...."

The litigation has proliferated to a point involving powerful and rich claimants to Indians lands, including the State of Iowa, which was joined by 44 States as *amici curiae*. The imperative need for 25 U.S.C. 194 cannot be better demonstrated. In simplest terms, Congress sought to protect the Indians under the circumstances which prevail here for it referred to "all trials about the right of property...."

In 1790, Congress adopted the first Indian Non-Intercourse Act.[158] The objective was then, as it is now, to prevent the loss of Indian lands through conveyances or otherwise without governmental consent. Justice Marshall alluded to the Act of 1802 and declared that the boundaries of the Indian lands and the rights of the Indian to those lands are ". . . not only acknowledged . . ." by the treaties there involved, but those property rights are "guarantied by the United States."[159] Chancellor Kent in his commentaries, written contemporaneously with the formulation of the policy to protect Indian property, declared that, where Indian lands are surrounded by a non-Indian population, the non-Indians are "penetrated with a perfect contempt for Indian rights."[160] Congress recognizes today that the need to protect Indians and

[158] 1 Stat. 137.

[159] Worcester v. Georgia, 31 U.S. 515, 556 (1832). See also, App., p. A17; 575 F.2d 629.

[160] 1 Kent's Commentaries, 286 (13th Ed., 1884).

their property from unscrupulous land exploiters is no less pressing now than it was when the Indian Non-Intercourse Act was enacted in 1834, when Chancellor Kent spoke of the white man's amorality regarding Indian property and when Justice Marshall rendered the *Worcester* decision.

5. *Petitioners Would Have The Court Violate, In Regard To 25 U.S.C. 194, The Long-Established Principles of Statutory Interpretation*

Recently, in *Antoine* v. *Washington*,[161] the Court recognized that the United States has a trust obligation not only to "Tribes," but to "individual Indians."

The plain reading of 25 U.S.C. 194 rejects the strict construction urged by Petitioners and *amici curiae* alike. That statute relates to ". . . *all trials* about the right of property in which an Indian may be a party. . . ." [Emphasis added] The probative language of the statute relates to all trials about the right of property in which an Indian may be involved. In seeking to achieve the explicit objectives of Congress, the Court adheres to these principles of construction:

> "[The intention of Congress] . . . is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will."[162]

It would be in clear violation of that expressed principle of statutory construction to adopt the concepts of Pe-

[161] 420 U.S. 194 (1975).

[162] Helvering v. Stockholm Enskilda Bank, 293 U.S. 84, 93-94 (1934).

titioners. If 25 U.S.C. 194 were limited to an "Indian" against a "white person," involving a particular tract of land, the Act would have been nullified immediately upon the death of the Indian. Thereafter, the "Indian" heirs would be required to act to preserve the decedent's property. Hence, it would no longer be an Indian against a white person; it would be several Indian heirs against the white person.

If Petitioners' concepts are adopted, 25 U.S.C. 194 would apply to Raymond G. Peterson, but not to R.G.P., Inc., a corporation comprised of Petitioner's heirs. As remarked above, R.G.P., Inc., petitioned for a Writ of Certiorari, No. 78-162, which was not granted.

It is submitted that Congress, wishing to protect Indians "in all trials," never contemplated that the death of a single white man or Indian would render nugatory 25 U.S.C. 194. Under those circumstances, the Court has repected the maxims *ejusdem generis* and *expressio unius es exclusio alterius*. It recognized that those maxims are but aids in construction and, when they would nullify the will of Congress, as proposed by Petitioners in connection with 25 U.S.C. 194, they are rejected.[163]

6. *Statutes Are To Be Construed Most Favorably For The Indians*

Petitioners and *amici curiae* seek to have 25 U.S.C. 194 construed in a manner diametrically opposed to the principles established and long adhered to by the Court in regard to legislation pertaining to Indians. In rejecting the contention that a statute should be strictly construed in regard to the Indians in keeping with the principles generally adhered to, the Court said this:

[163] Securities & Exchange Commission v. C.M. Joiner Leasing Corporation, 320 U.S. 344, 351, note 8 (1943).

> "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years. . . ." [164]

Numerous decisions, which adhere to that concept, support the contention that statutes of the character involved are not to be construed to the prejudice of the Indians.[165] Most recently, the Court declared:

> "The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." [166]

In *McClanahan*, the Court reviewed the concepts of construction and reiterated the controlling precept of interpretation involving Indian legislation:

> ". . . the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith.'" [167]

There has been long-time adherence to that principle.[168]

[164] Choate v. Trapp, 224 U.S. 655, 675 (1912).

[165] Carpenter v. Shaw, 280 U.S. 363, 367 (1930); United States v. Santa Fe Pacific RR. Co., 314 U.S. 339, 353-54 (1941); Intermarriage Cases, 203 U.S. 76, 94 (1906).

[166] Antoine v. Washington, 420 U.S. 194, 199 (1975).

[167] McClanahan v. Arizona, 411 U.S. 164, 174 (1973).

[168] Squire v. Capoeman, 351 U.S. 1, 6-7 (1956).

7. *The Court's Recent Nebraska* v. *Iowa Decision Has No Application Here—Trial Court Applied Nebraska Law*

For reasons not made clear, the trial court applied the laws of Nebraska. Apparently, it relied upon *Nebraska* v. *Iowa*. Disregarding that fact, Petitioners heavily rely upon presumptions under Iowa law. Relative to those presumptions and the lack of merit in them, is this fact: The trial court, after a full hearing, entered its Order of June 5, 1975, maintaining the Omaha Indian Tribe and the United States in possession.[169]

Basically, the conflict in *Nebraska* v. *Iowa*[170] arose over the vagaries of the Missouri River causing numerous changes of the stream, which had plagued the two States. They adopted an unvarying boundary line—or so they thought—by agreeing that their boundary would be the center of the then-designed channel of the Missouri River as proposed by the United States Corps of Engineers. As the Court points out, the designed channel was never utilized because the work was interrputed by World War II. On the subject, the Court stated: "the channel was redesigned, and by 1959 the River had been confined in the newly designed channel."[171] In 1963, because of the vagaries of the River and of the Compact, it was necessary for the States to have resolved disputes over thirty (30) separate ". . . areas of land, water, marsh or mixture entirely on the Iowa side of the compact boundary." At issue was whether the lands of the type in question were east or west of the 1943 boundary when those changes took place. The designed channel was limited to 700-800 feet in width. It is impossible to perceive how

[169] Pet.'s Br., pp. 35, *et seq.*; pp. 45, *et seq.*; see, Appendix, pp. 119, 124-25; see App., p. A13; 575 F.2d 628 in re Nebraska law.

[170] 406 U.S. 117, 119 (1972).

[171] *Ibid*

the very limited lands there involved could be controlling in these consolidated cases or how it could result in rejecting Federal law and applying Nebraska law to lands entirely within the State of Iowa.[172]

The Court of Appeals correctly recognized that all the issues—the conflict over title to the 2900 acres—arose long prior to the adoption of the 1943 Compact. Specific provisions in the 1943 Compact guaranteed that the "good" title in either State would not, in any way, be affected by the adoption of the amicable arrangement governing the boundary of the two States.[173] Under the circumstances, the Court of Appeals, most assuredly, did not err when it stated:

> ". . . since the issue concerns who held good title to the land in question prior to 1943, federal law must be applied."[174]

8. *In Error, Petitioners Contend That The "Special Relationship" Between The Tribe And The United States Does Not Justify Applying Federal Law In These Cases*[175]

Repeatedly where, as here, title to Indian land and jurisdiction over that land are the predominant issues, the Court has applied Federal law to the exclusion of State law. There is an unvarying line of authority in support of that proposition. Those cases hold that the primacy of Federal law will be recognized and that law applied in the fulfillment of the United States of its

[172] It is to be observed that Petitioners make no reference to the fact that the trial court applied Nebraska law in rendering its decision. See, App., pp. C2, *et seq.*, Memorandum Opinion.

[173] Iowa Code, 1977, p. LXXIV; Iowa Acts 1943, C306 Nebraska Law 1943, C130 R.R.S. Nebraska 1943, Vol. IIA, Appendix, p. 915, §§ 2 and 3.

[174] See, App., p. A15; 575 F.2d 628.

[175] Pet.'s Br., pp. 46, *et seq.*

unique obligation to the Indians and Indian Tribes including but not limited to the Omaha Indian Tribe.[176]

Petitioners' erroneous statements, relative to the Barnum Survey,[177] can, in no way, change the governing principles that Federal law is applicable here, all as has been discussed above.[178] Similarly, the map, appended to Petitioners' Brief, which map was prepared in disregard of proven facts and long after the trial court record in these cases was closed, should, it is respectfully submitted, be ignored. Not only is that map gravely in error, but it has no relationship whatever to the principles of law which are governing here.[179]

9. *Respondent Omaha Indian Tribe Is Within The Purview Of 25 U.S.C. 194*

Stress has been placed upon the fact that the inceptive litigation, giving rise to these cases, came about when "white person" Petitioner Harold Jackson sued "individual Indian" Edward L. Cline seeking to enjoin that "individual Indian" from occupying the 2900 acres comprising the Blackbird Bend Area.[180] That case comes clearly within the explicit language of 25 U.S.C. 194, which includes all trials between an Indian and a white man.

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[176] See, Worcester v. Georgia, 31 U.S. 515, 549, 556 (1932); Morton v. Mancari, 417 U.S. 535, 554-55 (1974); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-69 (1974); Seminole Nation v. United States, 316 U.S. 286, 297 (1942); United States v. Santa Fe Pacific RR. Co., 314 U.S. 339, 345, 353-354 (1941); Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); McClanahan v. Arizona, 411 U.S. 164, 174 (1973); Antoine v. Washington, 420 U.S. 194, 199 (1975).

[177] See, pp. 4-5, note 2, *supra*, *"In error . . . ."*

[178] See, pp. 60, *et seq.*, *supra*.

[179] See, p. 15, note 24, *supra*.

[180] See, pp. 30, *et seq.*, *supra*; pp. 59, *et seq.*, *supra*.

Congress was fully aware that the Indians, in 1834 when the Act in question became law, did not have the remotest knowledge of the complexities of real property law or the practices and procedures involved in suits to quiet title or to eject trespassers from the land. It was in contemplation of those circumstances that 25 U.S.C. 194 became law.

Manifestly, Congress had no intention—as asserted by Petitioners—that several heirs to land could not invoke the statute. Congress did not intend that 25 U.S.C. 194 would be nullified by a transfer from "white person" Petitioner Lakin to the State of Iowa.[181]

Congress was well aware in 1834 that Indian Tribes generally were the owners of the lands which they occupied pursuant to treaties. It was likewise aware that Congress had adopted a policy of protecting those Tribes in maintaining their possession and occupancy of land.[182] Additionally, Congress had knowledge that individual Indian ownership was limited. Indeed, the 1887 General Allotment Act[183] was adopted with one of its objectives being the dispersal of land among individual Indians and thus to weaken tribal ownership and control.[184]

Petitioners and *amici* alike complain that 25 U.S.C. 194 is an anachronism relating to an earlier period when the Indians were not well represented or a time when Indians were robbed of their properties.[185] There is no merit to that contention. These cases and the history of them prove the need for protection accorded the Omaha

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[181] See, pp. 30, *et seq.*, *supra*; pp. 58, *et seq.*, *supra*.

[182] App., p. A22; 575 F.2d 632.

[183] *Ibid.*

[184] Cohen, *Handbook Of Federal Indian Law*, (1945 Ed.), pp. 207, *et seq.*

[185] See, *amici* State of Indiana Brief, pp. 8-9.

Indian Tribe by 25 U.S.C. 194, all as applied by the Court of Appeals. It is observed in passing that the Court has consistently refused to legislate on the grounds that the acts of Congress were unacceptable by reason of age or otherwise. On the subject, the Court said this in regard to protection of property in which the Nation holds an interest:

> "The power over public land thus entrusted to Congress is without limitation. And it is not for the Courts to say how that trust shall be administered. That is for Congress." [186]

There has been adherence to that concept where criticism has been directed against the Congress for failing to develop Indian rights to the use of water. In rejecting the criticism, the Court of Appeals for the Ninth Circuit said this:

> "We deal here with the conduct of Congress as trustee for the Indians. It is not for us to say to the legislative branch of the government that Congress did not move with sufficient speed. . . ." [187]

It is respectfully submitted that the only reasonable interpretation of 25 U.S.C. 194, which pertains to ". . . all trials about the right of property . . ." is to declare, as did the Court of Appeals, that the cases of the character here involved include the Omaha Indian Tribe. Here the Tribe is acting not only to protect the individual Indian Edward L. Cline, but it is likewise acting to protect each and all of the Indians of which it is comprised. It would be, indeed, an anomalous circumstance if the Tribe, when acting for its members, would

[186] United States v. City and County of San Francisco, 310 U.S. 16, 29-30 (1940).

[187] United States v. Ahtanum Irr. Dist., 236 F.2d 321, 329 (CA 9, 1956); *cert. den.* 325 U.S. 988 (1957).

be denied the right to invoke 25 U.S.C. 194 on their behalf, as was done in these cases.[188]

D. The Court Of Appeals Was Correct In Its Analysis Of The Law Governing Accretions And Avulsions In These Cases

Extended review has been made of "The basic finding essential to the defendant's case. . . ." [189] That finding was, indeed, essential to Defendant's case. Involved were the affirmative defenses that Petitioners failed to sustain: (1) The obliteration of Blackbird Bend and (2) the restoration of it by accretions to the Iowa bank.[190] In rejecting out of hand that finding by the trial court, the Court of Appeals, based upon its complete analysis of the record stated:

> "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence." [191]

As pointed out above, the rejected finding was predicated upon the "educated guesses", the preferences and expectations of those witnesses rather than by any evidence.

As part of its analysis of the law in these cases, the Court of Appeals made an in-depth review of the prin-

[188] See, p. 74, *supra*.

[189] App., p. A39; 575 F.2d 639. See, pp. 50, *et seq.*, *supra*.

[189] App., p. A39; 575 F.2d 639. See, pp. *supra*.

[190] The finding, essential to the Defendant's case, was quoted by the Court of Appeals and is as follows:

> "The basic finding essential to the defendant's case is the trial court's statement that 'the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time new land was added to the Iowa riparian land . . . by the gradual process of deposition within the Blackbird Bend area . . . .' 433 F.Supp. at 88." See, App., A39; 575 F.2d 639.

[191] App., pp. A39-A40; 575 F.2d 639.

ciples governing accretions and avulsions.[192] That review of the law of accretion and avulsion by the Court of Appeals was principally background toward ultimate rejection of the finding by the Court for the reasons reviewed above. The Appellate Court was imminently correct in declaring that the trial court was in error in concluding that the Blackbird Bend Oxbow was obliterated and it was equally in error in declaring that the 2900 acres were replaced "under the sky" by accretions.

As reviewed above, the Omaha Indian Tribe introduced conflicting evidence which overcame the presumption, under the Iowa law, that the River moved by erosion and accretion, rather than by avulsion. As the Tribe overcame that presumption, the burden was fully upon the Petitioners to prove erosion and accretion and for the reasons expressed above, the "finding essential to the defendant's case" was and is "clearly erroneous."

On that background, reference will now be made to the Brief filed by Petitioner State of Iowa and the *amici curiae* who filed briefs in support of the State.

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[192] App., pp. A25, *et seq.;* 575 F.2d 633. The Court of Appeals has summarized its objections to the conclusions of the trial court in regard to the issue of what facts may be utilized to prove an avulsion. On the subject, the Court of Appeals said this:

> "In the present case the plaintiffs claim that a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion and its corollary rule that the boundary does not change with the shift of the thalweg. The trial court in rejecting this theory held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. We find this ruling inconsistent with settled principles governing the rule of accretion and the broader parameters involving the doctrine of avulsion. We therefore conclude that it was error for the trial court to reject the plaintiffs' legal theory in its evaluation of the evidence." (App., pp. A38-A39; 575 F.2d 637-638.)

IOWA'S STATUS IS ANOMALOUS: IT RAISES ISSUES HERE FOR THE FIRST TIME [193]

This is not the ordinary clash between sovereigns over the title and jurisdiction of the bed of navigable streams. Here, the State of Iowa traces its title to "squatter" Joseph A. Kirk, source of title for all Petitioners with the exception of Petitioner Harold Sorenson. Quit claim deeds from Petitioners Lakin and Raymond G. Peterson, whose heirs, upon his demise, organized a corporation using Peterson's initials for its name, are the immediate predecessors in interest of the State of Iowa.[194] Simply stated, Petitioner Iowa's title can rise no higher than that of "squatter" Kirk. As reviewed above, a Writ of Certiorari was granted [195] in regard to Iowa's question "4," which is as follows:

> "Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries." [196]

Yet, reference is not made by Iowa in its Brief to that question. Indeed, the State of Iowa, while ignoring the question for which it petitioned *certiorari*, likewise ignores the source of its title and makes no reference to the deeds from Petitioner Lakin and R.G.P., Inc., to which reference has been previously made.

Iowa, rather than referring to the question it presented for review, raises for the first time in the Court

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[193] P. 25, *supra*, *"Squatter" Joseph A. Kirk Is Principal Source Of Title For Petitioners Wilson, Lakin, Jackson (Wilson's Lessee)—Not Patents As Asserted.* See, in particular, p. 28, *supra*, *Petitioner State Of Iowa Traces Its Title To "Squatter" Joseph A. Kirk.*

[194] Pp. 26-27, particularly note 50, *supra*. As reviewed above, R.G.P., Inc., No. 78-162, petitioned the Court for a Writ of Certiorari, which was not granted.

[195] See, pp. 27-28, *supra*.

[196] *Ibid.*

issues which are most critical. Iowa refers to the fact that it was admitted into the Union in 1846,

> ". . . on an equal footing with the original thirteen states, and it then acquired sovereignty and ownership over the bed and banks of the Missouri River. . . ." [197]

Iowa further alleges, adhering to the same rationale as that just quoted, that

> "There can be no serious dispute that *Iowa owns the bed of the Missouri River within its boundary in the disputed area, together with islands formed therein after 1943.*" [198]

The Tribe denies the quoted claim of Iowa "in the disputed area." It concedes, in general, the propisition that States own the beds of navigable streams.

The sole and only evidence offered by the State of Iowa relates to the land, title to which Iowa traces to "squatter" Kirk. The Frontispiece reveals and an abundance of evidence proves this undeniable fact: Within the area of litigation, the channelized Missouri River with its artificial beds and banks presents issues concerning which Iowa offered no evidence in support of its claims to the bed of the stream or to the islands "in the disputed area."

Iowa adopted *en toto* the very extensive evidence offered by Petitioners Wilson, Lakin and Jackson. That evidence did not in any way support the quoted allegations taken from Iowa's Brief and set forth above.

In support of the Tribe's opposition to the efforts of Iowa to raise new issues for the first time at this juncture in the proceedings, reference is made to the Court's Rule 40. That Rule is explicit as it pertains to the circumstances here presented:

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[197] Iowa's Brief, p. 22.

[198] *Ibid.*, at p. 27 (emphasis added).

> ". . . the brief may not raise additional questions or change the substance of the questions already presented in those documents [the jurisdictional statement or the Petition for Certiorari]. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented." [199]

In applying the last quoted rule, the Court said:

> "This matter was not raised in the Court of Appeals or in the petition for a writ of certiorari. . . . Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here." [200]

Most recently, the Court rejected ". . . bare assertions . . . raised by petitioners for the first time before this Court." [201]

It is respectfully submitted that in reference to Iowa's claims, in regard to the "disputed area," concerning which no evidence was offered by Iowa at the trial, concerning which no trial court findings were entered and concerning which no reference was made by Iowa to the Appellate Court, Iowa may not raise those issues for the first time here. As repeatedy stated, Iowa's only offer of evidence—and the only right which it has any grounds for claiming—is to those lands conveyed to it by Petitioners Lakin and R.G.P., Inc., who trace their title to "squatter" Kirk. Under no circumstances should these crucial issues, which directly affect the interests of

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[199] Rules of the Supreme Court, Rule 40. Briefs—in general, 1(d)(2).

[200] Neely v. Eby Construction Co., Inc., 386 U.S. 330, 381 (1967).

[201] Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 235 (1976).

the Omaha Indian Tribe be presented here for the first time. The Court is respectfully petitioned to adhere to the clear statements of the Rule, to which reference has been made above.

Iowa's Brief is largely repetitious of the assertions by Petitioners Wilson, *et al.*, and responses have already been made to them. For example, Iowa speaks of the presumption of accretion under Iowa law. That presumption was rebutted by the Tribe.[202] Iowa, contrary to fact, asserts that the 2900 acres has always been in Iowa. That is untrue. The Compact changed the boundary and, at that time, the lands were within the exterior boundaries of the State of Iowa.

Iowa cites *Nebraska* v. *Iowa*.[203] That case is irrelevant.[204] Iowa adopted the record made at the trial by Petitioners Wilson, Lakin and Jackson. The trial court adopted Petitioners' findings. The Court of Appeals ruled those findings to be "clearly erroneous."[205] Iowa joined in claiming that the Blackbird Bend Oxbow had been obliterated. It was not. Iowa asserted and adopted the record to prove that the Blackbird Bend lands were replaced by accretions. They were not. Iowa claims title from "squatter" Kirk. Kirk's title failed—and so did Iowa's. Iowa offered no proof of ownership of any islands in the bed of the Missouri River within the disputed area or ownership of the bed of the stream. Iowa may not raise these issues for the first time here.

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[202] App., A24, note 22; 575 F.2d 632, 633; pp. 46, *et seq.*, *supra*.

[203] 406 U.S. 117 (1972).

[204] See, p. 72, *supra*.

[205] See, p. 54, *supra*. See, App., p. A23, note 21; A39, VI; A41-A42; A39-A40, "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence"; A56, "There exists no factual predicate whatsoever to support this [trial court's] conclusion"; A65, "We conclude . . . [from the record] that it is entirely speculative to determine when and how the thalweg moved to the position shown on the 1923 map"; A44, "We find the evidence concerning bar C to be highly conjectural and inconclusive . . . ."; A45, ". . . we regard the evidence of the defendants as insubstantial." A46, "Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibility." A47, "Defendants' experts also relied upon inferences . . . . The record, in our judgment, requires us to give little or no probative effect to the ultimate conclusion reached from these factual premises." A49, note 49. A59, The Court below made reference to the fact that a principal witness of the Petitioners conceded that the conclusions expressed were "educated guesss." A65, "The essential inferences cannot be left to speculation or conjecture." (575 F.2d 633; 640; 639; 646; 650; 641; 641-2; 642; 642; 643; 648; 650).

Iowa Substitutes A New Question In Lieu Of That Concerning Which The Writ Of Certiorari Was Granted

Reference has been made above[206] to the fact that Petitioner Iowa's Brief does not mention question "4," concerning which a Petition for Certiorari was filed or concerning which a writ was granted. Iowa, rather, appears to request a review of this proposition:

> "Whether the Court of Appeals' decision violates established principles of Federalism."

As reviewed above, the Court's Rule No. 40 precludes that course of conduct.[207]

Iowa Complains That 25 U.S.C. 194 Does Not Apply To It

Iowa declared that it is not within the purview of the Act.[208] What Iowa does not refer to is an element that is most pertinent here: "White person" Petitioner Jackson initiated a case against the Omaha Indian Tribe. That action precipitated the proceedings that are here before the Court.[209] Petitioners Wilson and Lakin, "white persons," joined Jackson in the litigation stemming di-

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[206] See, p. 28, *supra*.

[207] See, pp. 80-81, *supra*.

[208] Pet. Iowa's Br., pp. 11, *et seq.*

[209] See, pp. 30, *et seq.*, *supra*.

rectly from the proceedings by Jackson against Cline. Iowa was necessarily named a party to the proceedings because the records showed that it was claiming adversely to both the United States and the Omaha Indian Tribe. It would be, indeed, an anomalous situation if 25 U.S.C. 194, having been enacted for the benefit of the Omaha Indian Tribe, could be defeated by the simple transfer of title to the State of Iowa. That implausible consequence should not be permitted to occur for to do so is tantamount to the abrogation of the will of Congress to protect the Indians in their title to their lands, all as reviewed in detail by the Court of Appeals.[210]

Iowa asserts that it is not a "white person" and the Omaha Indian Tribe is not an "Indian" within the purview of 25 U.S.C. 194. Response to Iowa's challenge as to 25 U.S.C. 194 has been reviewed in detail above.[211] Iowa and all other Petitioners rely heavily upon the *Perryman* case.[212] That decision, whatever its merits on the facts there presented, has no bearing on these consolidated cases. In that connection, there has been reviewed above the fact that Congress has the power to protect the Indians in their ownership and possession. It did so in regard to ". . . all trials about the right of property . . ." in which an Indian may be involved. It most assuredly, as stated, does not preclude the United States from appearing on behalf of an "Indian." Similarly, the Tribe may appear on behalf of an "Indian" involved in litigation of that character. It is unquestioned that the Tribe and the United States created a presumption of title of the Indians by the fact of previous possession and ownership.[213] Quite obviously, there

[210] See, p. 64, *supra, 25 U.S.C. 194—An Appropriate Exercise of Authority By The Congress Of The United States And Correctly Interpreted By The Court Of Appeals.*

[211] See, p. 64, *supra.*

[212] United States v. Perryman, 100 U.S. 235 (1880).

[213] See, App., p. A25; 575 F.2d 633.

was a compelling governmental interest in the United States protecting the Indians in their possession of the 2900 acres.

Congress did not have an intention to limit the benefit of 25 U.S.C. 194 to a single Indian when it referred to "all trials". Manifestly, "all trials" will include complex, multi-party/multi-issue case of the character involved in these consolidated cases.

On the subject, the manner in which a statute should be read involving either the States or the United States, the Court declared:

> "Is the United States a resident within the meaning of the words 'residents, corporate or otherwise'? We think it is. It many times has been held that the United States or a *state* is a 'person' within the meaning of statutory provisions applying only to persons. . . . . in Stanley v. Schwalby, 147 U.S. 508, 514 . . . it was held that the word 'person' used in the statute there under consideration would include the United States 'as a body politic and corporate.'" [214] [Emphasis supplied]

Manifestly, 25 U.S.C. 194 was intended to protect Indians in all trials involving their ownership and possession of their lands. Under the circumstances, the Court has regularly sustained acts of that character, particularly in regard to Indians where the principles of construction are to rule favorably for the Indians and never to their prejudice.

[214] Helvering v. Stockholm Enskilda Bank, 293 U.S. 84, 91, 92 (1934).

RESPONSE TO BRIEF OF AMICI CURIAE IN SUPPORT OF THE STATE OF IOWA FILED BY THE STATE OF INDIANA AND OTHERS

It is clear that the State of Indiana and other States, which joined Indiana as *amici curiae* supporting Iowa, proceeded upon some very basic misconceptions, all as reflected in their Brief. Let this fact be respectfully emphasized: The Omaha Indian Tribe has not trenched upon Iowa's sovereignty. Iowa's claims to the bed of the Missouri River, concerning which Iowa raised no issue at the trial or on appeal, is presented for the first time here without any facts in support.[215]

The case between the Omaha Indian Tribe and the State of Iowa is unique. Iowa claims title to the lands involved in these proceedings from "squatter" Kirk, from whom all other Petitioners, with the exception of Petitioner Sorenson, deraign their titles. There is no denial by the Tribe that, under appropriate circumstances, Iowa does, in fact, own the bed of the stream to the center of the thalweg. That issue is not here involved.[216]

Great stress has been placed upon the interpretation by the Court of Appeals of 25 U.S.C. 194. It is the position of the Omaha Indian Tribe that there is the primacy of Federal law in these cases and that 25 U.S.C. 194 is an appropriate exercise of that law. It is further the position of the Tribe that the Court of Appeals is imminently correct in its interpretation of 25 U.S.C. 194. An overriding factor, however, ignored by Iowa and all Petitioners is this: The State of Iowa joined Petitioners in affirmative defenses declaring that the lands originally owned by the Omaha Indian Tribe had been washed away and completely replaced by accretions to the Iowa shore.

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[215] See, p. 79, *supra*.

[216] *Ibid.*

Thus, Iowa had the burden of proving those facts and it failed to sustain that burden.[217]

It is manifest that the *amici curiae* were wholly unaware of the factual background, particularly in regard to the circumstance where the claims of Iowa were predicated upon title from a "squatter" rather than on the basis of a sovereign claim to the bed of the Missouri River. As a consequence, the States have presented to the Court issues which are not germane to these proceedings.

There has been reviewed in depth above the longstanding principles of jurisprudence that bring the issues here before the Court within the province of Federal law.[218] Additionally, the *amici curiae* complain about the interpretation of 25 U.S.C. 194. Nevertheless, it is clear beyond question, predicated upon the criterion for construing Indian statutes, that the Court of Appeals was imminently correct in applying 25 U.S.C. 194 to Petitioners in these cases.[219]

RESPONSE TO AMICI CURIAE— CALIFORNIA AND OTHERS

California and the States joining it, hereafter referred to as California, in the *amici curiae* Brief proceed upon misconceptions as to the status of Iowa. California, as its Brief discloses, invisions a violation of the sovereignty of the State of Iowa in regard to the bed of the Missouri River. Similarly, California reflects a concept that, in some manner, the lands here involved claimed by the

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[217] See, p. 50, *supra*.

[218] See, p. 60, *supra*, *The Laws Of The United States Govern Where, As Here, The Issue Is "Whether" Title To The Blackbird Bend Oxbow Passed Out Of The Omaha Indian Tribe And The United States.*

[219] See, p. 54, *supra*.

State of Iowa stem from that State's sovereignty. That, of course, is not the circumstance. The State of Iowa simply participated in dividing up the Indian lands that had been trespassed upon by "squatter" Kirk. It has no claim based upon the ownership of the bed of the stream, nor did it offer any evidence in support of that claim.[220]

Throughout California's Brief, there are implications that, in some manner, a boundary dispute was not involved. That is, of course, totally incorrect. The center of the Missouri River was the boundary between the Omaha Indian Reservation and the State of Iowa throughout the whole time when the River was moving. As repeatedly pointed out above, the Iowa-Nebraska Compact in no way affected "good title" at the time the arbitrary boundary compact arrangement was entered into. The question is title stemming from river movement during the time when the boundary was the center of the stream. Failure to take cognizance of that fact gives rise to extended, but irrelevant, comments by California.

California likewise ignores the fact that Federal law controls where, as here, the issue is "whether" title had passed from the Omaha Indian Tribe by reason of alleged river action. That Petitioners, who assumed the burden of proof by their affirmative defenses, failed to sustain that burden eliminates most of the arguments presented by California.[221]

[220] See, pp. 79, *et seq.*, *supra*.

[221] See, pp. 50, *et seq.*, *supra*.

RESPONSE TO TITLE INSURANCE AND TRUST COMPANY, PIONEER NATIONAL TITLE INSURANCE COMPANY AND AMERICAN LAND TITLE ASSOCIATION, AMICI CURIAE

It is clear that these *amici curiae* have proceeded upon the same erroneous concepts as did the other *amici*, to which reference has been made. They do not take cognizance of the fact that the claims of the State of Iowa are predicated upon and traced back to a "squatter" on the lands claimed by the Omaha Indians. 25 U.S.C. 194, while placing the burden of proof upon Petitioners, was no more onerous than the burden Petitioners had to assume—to sustain their affirmative defenses.[222] Undoubtedly, if the States and other *amici curiae* had comprehended the factual situation here present, they would not have attempted to participate in this litigation.

CONCLUSION

Petitioners are here seeking a second appellate review in regard to issues which were fully considered and passed upon by the Court of Appeals which declared, after that review, that all of the crucial findings of the trial court were "clearly erroneous." That Appellate Court ruling stemmed from the fact that the findings, prepared by Petitioners and adopted verbatim by the trial court, were unsubstantiated, arose from testimony which was purely speculative; that the conclusions were conjectural and without foundation in fact.

Petitioners had pleaded affirmative defenses and had assumed the burden of proving those defenses by elaborate —albeit, speculative—testimony to support those affirmative defenses and prayed that judgment be entered in their favor. The trial court granted their prayer for relief predicated upon the findings, which the Court of

[222] See, p. 58, *supra*.

Appeals ruled were "clearly erroneous" and, for that reason, reversed the trial court.

In its opinion, the Court of Appeals declared that there must be adherence to Federal law because the subject matter of the cases was the title to lands claimed by the Omaha Tribe, pursuant to the Treaty of 1854. Additionally, said the Appellate Court, the Federal laws were applicable because an interstate boundary line was in dispute at the time the conflict arose. Accordingly, the Court of Appeals, pursuant to 25 U.S.C. 194, placed the burden of proof upon Petitioners. In light of the facts here presented, that statute is applicable. Moreover, the burden was voluntarily assumed by Petitioners. They did not sustain it. Accordingly, the Court of Appeals should be affirmed.

Respectfully submitted,

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